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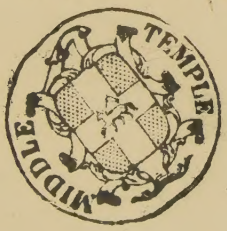
A TREATISE

ON THE

LAW AND PRACTICE OF LUNACY.



A TREATISE

ON THE

Law and Practice of Lunacy

COMPRISING AS WELL THE

CARE AND CUSTODY OF LUNATICS BY THE CROWN

AS THE RELATION OF

INSANITY TO THE CIVIL AND CRIMINAL LAW,

AND THE

LAW OF EVIDENCE IN REGARD TO INSANITY:

WITH AN APPENDIX

CONTAINING THE

SECTIONS OF THE LUNACY ACTS, 1890 & 1891, RELATING TO LUNATICS UNDER THE CARE AND CUSTODY OF THE JUDGE IN LUNACY, THE RULES IN LUNACY, 1892,

AND AN

INDEX OF PRECEDENTS AND FORMS.

By H. M. R. POPE, M.A.,

LATE OF LINCOLN'S INN, BARRISTER-AT-LAW,
AND SOMETIME FELLOW OF LINCOLN COLLEGE, OXFORD.

SECOND EDITION

BY

J. H. BOOME, AND V. DE S. FOWKE,

OF THE MIDDLE TEMPLE, OF LINCOLN'S INN,
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EDITOR'S NOTE.

THE work has been brought down to date by the incorporation of the appropriate sections of the Lunacy Act, 1891, and the Rules in Lunacy, 1892, in lieu of the now annulled Rules of 1890. To facilitate reference, a Table is given at page 458*a* showing the old Rules of 1890 corresponding to the Rules now in force.

26, OLD SQUARE, LINCOLN'S INN,
March, 1892.

EDITORS' PREFACE

TO SECOND EDITION.

The delay in the appearance of a Second Edition of the late Mr. Pope's Treatise, has been caused by the repeated rumours of alterations in the existing law, and by the prevailing uncertainty as to what form the anticipated legislation, whether of substantive law or procedure, would actually take. The Act of 1890 at last seems to give some promise of finality in lunacy legislation, and a New Edition has accordingly been prepared. Though comparatively few changes of importance have been introduced into the law and practice by the recent statute, yet the statute and rules of the present year, have rendered necessary an entire remodelling of those portions of the book, which were mainly concerned with the now repealed Acts of 1853 and 1862, and the former general orders. The reasons indicated in the Author's Preface to the first edition have guided the editors in the choice of the Sections of the Lunacy Act, 1890, set out in full in the Appendix, which they believe contains all the sections of the act of interest to the class of practitioners for whom the work is primarily intended. It is hardly necessary to say that the practitioners referred to are those whose duty it is to manage and administer the property of lunatics who have been so found, or have, by virtue of s. 116 of the Lunacy Act, been brought within the clauses of the act relating to management and administration. For the same reasons the synopsis of the law relating

to Institutions for the reception of the insane, which found a place in the Appendix to the first edition, has now been entirely omitted, without, it is hoped, in any way diminishing the utility of the work as a practical Treatise on an independent branch of lunacy law quite distinct from that dealt with (for instance) by Mr. Archbold and Mr. Fry in their respective works. The sections of the Lunacy Act now in force set out in the Appendix cover the whole ground formerly occupied by the Acts of 1853 and 1862, which were set out in full in the first edition, while the sections relating to vesting orders, now forming part of the lunacy legislation strictly so called, and also appearing in the Appendix, give the present volume in some respects a wider scope than its predecessor.

In conclusion, it remains for the editors to express their hope that the treatise will continue to maintain its high character and popularity as a leading text-book, and that the second edition will be as favourably received as the first by members of both branches of the legal profession, to whose indulgent criticism the editors now submit the result of their labours.

26, Old Square, Lincoln's Inn,
October, 1890.

AUTHOR'S PREFACE

TO FIRST EDITION.

THE last Treatise on the Law and Practice of Lunacy was published in the year 1863. The Second Edition of Mr. Shelford's book, still that most usually referred to, was published in the year 1847. Meanwhile the law and practice have been materially changed. These facts will, it is hoped, be a sufficient apology for the present Treatise.

In preparing the first Part of the first Book, which is concerned with the care and custody of lunatics so found by inquisition, and the first Chapter of the second Part of the same Book, which is concerned with the jurisdiction of the Court of Lunacy over lunatics not so found, the Author has had frequent occasion, as the notes testify, to refer to Mr. Elmer's book on the Practice in Lunacy. To have omitted the part of the subject covered by that most useful Treatise would have been no less absurd than it would have been presumptuous to seek information elsewhere. It is only left for the Author to acknowledge the extent of his obligation. The second Chapter of the same Part is addressed to the jurisdiction of the Chancery Division of the High Court in the matter of lunacy, a point for the first time carefully considered in Mr. Phillips' Treatise.

The remaining Books, which are concerned with the lunatic in his civil and criminal relations, and with the evidence of lunacy, break ground which has practically lain fallow since Mr. Shelford's Second Edition of 1847. To confess indebtedness to that most laborious author is matter of course in all who follow him in any subject he

has touched. In the present Work the Author has sought to combine Mr. Shelford's comprehensiveness with something more of method and conciseness. At the same time some authorities prior to 1847 have been added, and the law has been brought down to the present date.

The first and second Parts of the Appendix, which contain the Lunacy Regulation Acts and the General Orders in Lunacy respectively, require no comment. The third Part consists of a small collection of Forms, supplemented by a large number of references to the books in which other forms may be found.

For the precedents actually given the Author is indebted to the kindness and courtesy of his clients. For the rest he was unwilling either to omit reference to them altogether or to present to the public Forms which had not undergone the ordeal of Practice.

The fourth Part of the Appendix calls for some explanation. It was originally intended that a Treatise on the law relating to institutions for the insane should form a substantive part of the present volume—and such a Treatise had in fact been written. But the appearance in rapid succession of the new editions of Mr. Archbold's and Mr. Fry's books on the subject made it unnecessary, while the impending alteration of the law made it inexpedient, to incorporate it. The fourth Appendix is a synopsis of the contents of that Treatise with references to the authorities from which it was compiled, and is added to serve a temporary purpose and give a formal completeness to the whole Work.

In conclusion, the Author takes this opportunity of acknowledging the kind help of his friend Mr. J. H. Boome, of the Middle Temple, in passing the Work through the Press.

26, Old Square,
August, 1877.

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THE LAW OF LUNACY.

INTRODUCTION.

1. *What is meant by Insanity.*

Insanity consists in the absence or perturbation of reason.

Dr. JOHNSON, followed by most of the lay lexicographers, explains insanity by "want of sound mind, madness;" while "madness" is "distraction, loss of understanding, perturbation of the faculties." "Mad" is "disordered in the mind, broken in the understanding, distracted," and a madman is "a man deprived of his understanding." Thus it appears that insanity is an irregular mental condition, and irregular in one of two ways; viz., in the absence of a faculty or faculties, or in the perturbation of a faculty or faculties. The faculty particularly referred to is the understanding, which may perhaps be identified with the understanding described by John Locke as "setting man above the rest of sensible beings, and giving him the advantage and dominion which he has over them" (*a*). It is something wider than and inclusive of the discursive faculty; it is the faculty of forming conceptions and judgments as well as inferences; it is, in fact, the universalizing element in man, or what is commonly called reason. Accordingly, insanity may be defined as a defect of reason, consisting either in its total or partial absence, or in its perturbation (*b*).

(*a*) Human Understanding, bk. 1, c. 1, s. 1.

(*b*) This is practically in accordance with medical distinctions. See *Banks* v. *Goodfellow*, L. R., 5 Q. B. 565; *Smee* v. *Smee*, 5 P. D. 84; *Jenkins* v. *Morris*, 14 Ch. Div. 674.

How expressed.

This defect is expressed in a peculiarity of language and conduct differing on the one hand from such peculiarity as appears in an impediment of speech, and on the other, from such peculiarity as results from paralysis, deformity or mutilation. The peculiarities in word and act seem to correspond, and point to a common origin, which is identified with an abnormal state of mind.

Delusion and not hallucination or illusion.

Thus it is to be observed—1. That insanity is a state of mind; irregularity in the sense impressions frequently attends insanity, but is not the test of it; illusion or hallucination may exist, though the person visited by them is perfectly sane (*c*). It is the want of power after and notwithstanding a mental process to recognize these conditions for what they really are, and the consequent persistence in them, or, as it is called, "delusion," that is the conclusive proof of such perturbation of mind as amounts to insanity (*d*). "It is only the belief in facts which no rational man would have believed in, that is insane delusion" (*e*).

Incapacity to reason.

Again, it is not merely the belief in facts which no rational man would have believed in, that is insanity, but also the inability to think or form beliefs at all upon subjects about which men commonly think or form beliefs. This incapacity, though not delusion, is without doubt considered insanity. In other words, insanity includes not merely perturbation of reason, or *mania* with all its varieties, but also deficiency of reason or *dementia*, including idiocy, imbecility and fatuity (*f*).

Insanity an abnormal state.

2. The perturbation or deficiency of reason which consti-

(*c*) Perversion of the faculty of perception or apprehension, including the sense organism, is of two kinds: 1, hallucination, where a sensation is referred by its subject to an external object which has no existence; and 2, illusion, where a sensation is referred by its subject to a wrong external object. See 2 Taylor, Med. Jur. 467, 478.

(*d*) So Casper says, "the insanity of the erroneous delusion or idea arises not from its falseness but from its taking root." For. Med. pt. vi. c. 2, s. 73.

(*e*) Pagan, Med. Jur. of Ins. 59, and cf. *East India Co.* v. *Dyce Sombre*, 4 W. R. 714, 716.

(*f*) Post, p. 76.

tutes insanity presents itself as an abnormal state of the mind. This relieves us from the paradoxical truism that insanity is the absence of sanity, which follows from setting these terms in absolute contradiction, and which leads to the inference that all the world is insane (*g*). It refers us to the relative sphere of human experience, which recognizes a normal standard of rationality, and pronounces that man to be insane who does not conceive, judge or reason as the normal man conceives, judges or reasons, or as it can conceive the normal man conceiving, judging or reasoning (*h*). The mental defect, whether in the way of absence or perturbation, must be greater than the normal defect, to make a man insane. In other words, mere vehemence, simple stupidity, common illogicality, ordinary prejudice, vulgar error, are not, nor are methods or results of thought consequent thereon, any test of insanity. Moreover, where, as often happens, the question of insanity has to be determined by ordinary jurymen, whose own minds are fair types of the normal intelligence, and who have not sufficient experience of human affairs to recognize the varied forms which the normal intelligence assumes when applied to a variety of subject-matters, the formula above stated appears in the following shape:—That man is insane who does not conceive, judge or reason as I conceive, judge or reason, nor as I can imagine myself conceiving, judging or reasoning (*i*). Persons of greater experience and observation will be better able to dissociate in particular cases the mental capacity of the individual from the peculiar bent and character of his mind. It is always the vulgar who sees madness in eccentricity.

(*g*) The distinction between the absolute antithesis and a relative one is neatly illustrated by the rule that to say a man is "insane" is libellous; to say he is "not of sound mind" is not so; because no one is of perfectly sound mind but the Deity. 1 Chitt. Med. Jur. 351.

(*h*) Cf. Stephen's Hist. of the Crim. Law of England, vol. ii. pp. 124–186; 2 Taylor's Med. Jur. 502; *Boughton* v. *Knight*, L. R., 3 P. & D. 68.

(*i*) *Boughton* v. *Knight*, *ubi sup.*

2. *Why does Insanity occasion peculiar Law.*

(a.) From the nature of law.

Law, says Mr. Austin, is "a command which obliges a person or persons"—a command is "a wish or desire conceived by a rational being that another rational being should do or forbear" (*k*). Therefore the insane person, so far as irrational, cannot be the object of law.

(b.) From the nature of society.

Again, civil society implies an aggregation of rational beings, and irrational beings are only incidentally connected with it. So far as they are irrational, the insane, though in the state, are not of the state. On the other hand, though not of the state, the insane are yet in the state. Hence the state has relations with them, though not those which it has with its citizens proper. Neither again are these relations merely those which the state has with animals; for (a.) the insane are seldom wholly irrational, and (b.) they are men, although imperfect men; and it is for the benefit of its citizens who are men also that the state should recognize in the mere fact of humanity a sanctity not belonging to any other object with which it is brought into relation. This *de facto*, if not *de jure*, membership of the insane once admitted, the practice of all civilized nations has extended to them that protection which the state extends to all its members, and which it is to the interest of society that it should extend the more readily, the greater the weakness that requires it. Nor is it merely against others that this protection is needed or conferred. From the same primary principle of the sanctity of human life, and the paramount importance to society of maintaining that principle in its integrity, the state is concerned to protect the insane against themselves. Hence at once the duty and the right to exercise coercion and impose restraint.

Protection of the insane.

Protection against the insane.

Finally, it is to the interest of public safety that society should itself be protected against the insane. Possessed of physical force without a regulating mind, and subject to

(*k*) Aust., Jur. Lect. 1.

the natural instincts untutored by discipline and uncontrolled by fear of punishment, some classes of the insane threaten continual danger to those with whom they are brought into contact. The very motivelessness of their acts is an additional element of peril. Hence again the duty and right of the state, for its own sake as well as for that of the insane, to exercise peculiar powers of seclusion and control.

Thus there is found within the state a class of persons who, though sharers in the common humanity, can neither exercise the rights nor perform the duties of citizenship; who are more than other persons liable to injury from themselves and others, yet are unable on their own behalf to call for protection; who finally are more than others liable to injure society, yet are neither amenable to its influence nor bound by its ordinary laws.

Where the conditions are so peculiar, the rules regulating them will be peculiar also. The absence of reason creates in fact an elementary difference in the relations of the individual to the state and the law of the state. Among all the varied circumstances of civil life, there is scarcely one but is affected by it. In the eye of the law the insane in life and after death stand for a thousand purposes a class separate and distinct.

3. *Of the Legal and Medical Conceptions of Insanity.*

Difference between law and medicine in their view of insanity.

While medicine regards insanity as a disease, one of the effects of which is to produce conduct of a certain character, law follows popular experience in treating it as a definite condition to be contemplated in action or in such thought only as may be inferred from action. To the physician conduct is one and one only of the evidences of the mental disease; his art furnishes him with others; and, though some of these rest merely on hypotheses, which, if not denied, are far from being established, while others are of occasional application only, yet they often modify his judgment. Hence he is frequently placed in a false position

when brought into contact with law, which seeking merely to prove or disprove the fact, and availing itself chiefly of evidence of conduct, regards with suspicion hypothetical relations of cause and effect, and not the less that it finds the doctors themselves disagreeing upon them (*l*).

The truth is, that law understands by insanity so much of what medicine, of whatever school, understands by the same name, as calls for its assistance or interference in a peculiar way. It is of no consequence, for the simple purpose of law, whether the abnormal mental condition consists in a perturbation or in a deficiency of reason, provided that it is such as to require that assistance or interference. Law has varieties of insanity, it is true, but they depend not so much on the individual as on the particular circumstance in which he is placed, and which makes it necessary to determine the question of his mental condition. In other words, a person, medically speaking insane, may be legally sane for one purpose and legally insane for another. The varieties of legal insanity are varieties in degree; not, as the varieties of medical insanity, varieties in kind (*m*).

Greater precision demanded by law.

But if law has in this respect a more simple problem than medicine, its solution must be more definite and categorical. Popular experience, we have seen, deals with the question of insanity in a general manner only, and finds, therefore, but little difficulty in the conception: "There is no possibility of mistaking midnight for noon; though at what precise moment twilight becomes darkness is hard to determine" (*n*). Now before the law can treat any individual case of insanity, it has to decide whether this precise moment has or has not arrived. Its verdict is bound to be simply affirmative or negative. Medicine, on the other hand, can make a compromise, for the treatment applicable to insanity will scarcely injure one who totters on its verge;

(*l*) Steph. Hist. of Crim. Law in England, vol ii. pp. 124–186; Casper, For. Med. pt. vi. c. 1, s. 57; conf. pt. vi. c. 2, s. 71.

(*m*) Post, pp. 20, 21.

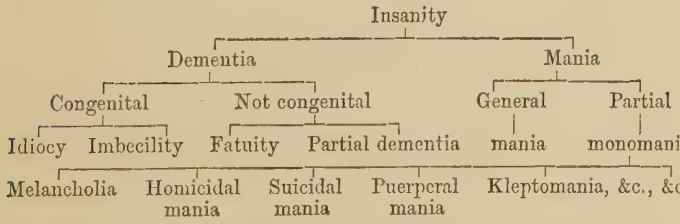
(*n*) *Boyse* v. *Rossborough*, 6 H. L. C. 45, per Cranworth, C.

it can temporize, for insanity is seldom, medically speaking, critical. No such evasion is open to the law. The decision must be, once for all, yes or no (*o*).

Misunderstandings from difference of nomenclature.

Finally, lawyers and medical men experience difficulty in mutually understanding each other from the difference in the nomenclature which they respectively employ. The former use insanity, lunacy, unsoundness of mind, either promiscuously or with artificial distinctions which are continually varying. Thus insanity is more commonly applied in connection with crime, lunacy in relation to civil rights and duties; again, a lunatic is sometimes used to distinguish a person found of unsound mind by inquisition, from a person of unsound mind who has not been so found. Meanwhile, the varieties in degree of insanity, which are of chief importance in law, have no distinctive names. Medicine, on the contrary, has established a terminology corresponding to a more or less generally recognized classification of insanity. It has occurred to the author that a brief statement of this here may afford to those, who will compare it with the account of legal insanity which follows it, the means of removing the misunderstanding above mentioned.

4. *The Medical Nomenclature of Insanity* (*p*).



Medicine, like popular experience, divides insanity according as it consists in a deficiency or a perturbation of

(*o*) Cf. per Pollock, C. B., in *Clift* v. *Schwabe*, 3 C. B. 437.

(*p*) In this short sketch of medical insanity the author has chiefly followed Dr. Taylor in his Treatise on Med. Jur. as holding an intermediate position between the opposed schools on insanity. See the Med. Jur. vol. 2, pp. 462 *et seq.*

the mental powers. The former state is called *dementia*, the latter *mania* (*q*).

Dementia naturalis.

Dementia naturalis or congenital *dementia* consists either in an absolute want of reason, attended by a defective structure of the brain, and marked by entire absence of facial expression, of speech and of memory, when it is

Idiocy.

called idiocy; or in a partial want of reason, which need not have any corresponding physical defect or peculiarity, but prevents the patient from attaining any considerable amount of knowledge or intelligence, when it is called

Imbecility.

imbecility.

Dementia proper.

In *dementia* proper the mind has been more or less completely formed, but its powers have since become wholly or partially inactive. In the former case, when it

Fatuity.

is called fatuity, the language is incoherent and meaningless; memory and all appreciation of the proper relation of things are lost. More commonly, however, this extreme stage is never reached; the mental powers decay, but do not die until the physical organism dies also. The disordered minds of the aged frequently exhibit memory, and some degree of mental power, but it is partial in subject, and fitful in operation.

Mania.

Mania, or the perturbation of the mental faculties, is so invariably indicated by delusion, that the latter is not unfrequently accepted as the one conclusive test of its existence. *Mania* is, however, frequently accompanied by perturbation of the emotions; and here again this perturbation so constantly takes the form of excited violence, that it is a popular notion that violent fury is met with in all cases of *mania*. The perversion of mental and emotional faculties frequently finds expression also in a restless eye, a stooping gait, incessant incoherent talking and an excited manner (*r*).

(*q*) Cf. Locke on the Hum. Und. bk. 2, c. 11, ss. 12, 13; Esquirol, Mal. Ment. ii. 229, 232.

(*r*) "It is not madness
That I have uttered; bring me to the test,
And I the matter will rehearse, which madness
Would gambol from."——
Shaksp. Hamlet, III. iv. cf. D'Isr. Cur. of Lit. vol. 2, p. 315.

Mania, accordingly, bears some resemblance to two states both consistent with general sanity, viz., *delirium* and eccentricity. *Delirium* may be distinguished by its being always dependent upon bodily disease, and by the fact that in it the senses are commonly quickened to an extraordinary degree. Eccentricity may be to some extent also distinguished from *mania* by definite tests, *e. g.*, in *mania* there is an obvious change of character, while the eccentric man is consistent with himself even in his inconsistency; eccentric habits, therefore, suddenly acquired are presumptive of insanity. Again, an eccentric man may be convinced that what he is doing is absurd, or at least contrary to the general rules of society, but he professes to set these rules at defiance; a maniac, on the other hand, cannot be convinced of his error (*s*).

Delirium.

Eccentricity.

The greatest difficulty in this respect is presented by that partial form of *mania* called *monomania*. The patient has generally enough shrewdness to know the consequences which will follow the avowal of his secret delusion, and to conceal it with success from those who are not possessed of the key, or to affirm its entire removal to those that are (*t*).

Monomania.

Monomania has, by the ingenuity of medical schools, been subdivided into many species according to the form in which it exhibits itself. They are in a medico-legal sense valueless (*u*). A more dangerous attempt to construct a separate species of *mania* itself was made in favour of so-called moral insanity, or *mania sine delirio*. Its claim to existence has been contested in the medical profession, and is unrecognized by law (*x*).

Species of monomania.

(*s*) Casper, For. Med. pt. vi. s. 79; Pag. Med. Jur. of Ins. p. 26; Gooch, Diseases Peculiar to Women, p. 190.

(*t*) See An Inquiry concerning the Indications of Insanity, by Dr. Conolly, p. 384; *Hadfield's case*, 27 How. St. Tr. 1313, 1316; per Cottenham, C., in *Re Dyce Sombre*, 1 Mac. & G. 116.

(*u*) Cf. Neumann, Lehrbuch der Psychiatrie, p. 237; Casper, For. Med. pt. vi. s. 70.

(*x*) The theory of *mania sine delirio* was started by Pinel in his *Traité Médicophilosophique sur*

5. *The Legal Nomenclature of Insanity* (*y*).

In turning to the legal terminology of insanity we may remind our readers of what has been already said as to its imperfections. 1. It is confused, no single distinction being generally adopted or conformed to. 2. The distinctions which attained a moderate celebrity have become obsolete. 3. The varieties of insanity which are more important, *i.e.*, the insanity which creates civil incapacity, or testamentary incapacity, or criminal irresponsibility, and the like, have no distinct names. With this warning we proceed to examine (i) the names actually used to indicate insanity, (ii) the meaning of certain celebrated words of art, and (iii) the *criteria* of those varieties of insanity already alluded to.

Bracton. Fleta.

(a.) *Furiosus, non sanæ mentis, mente captus,* appear in Bracton (*z*), and the author of Fleta (*a*), with apparently the same connotation; *fatuus* also occurs in both, Bracton using it to include a less irrational condition than that connoted by the other words (*b*). Britton, similarly, has *Sot* and *Hors son sens* (*c*). *Idiota* first appears in a

Britton. Mem. Scacc. 1291, A.D.

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l'Aliénation Mentale. Ettmüller had spoken of *melancholia sine delirio.* Reil, Hoffbauer, Mittermaur, Hautmann and Prichard support; Esquirol, Henke, Ideler, Casper, Mayo and Brodie are firmly opposed to it.

(*y*) The Roman law speaks only of *dementes,* of whom *mente capti* and *furiosi* were recognized as subdivisions. In accordance with this great precursor, almost all subsequent statute books, in particular almost all the German statute books and the Code Civil, have laid down insanity, *mania* and idiocy as, so to speak, legal forms of mental disease, and these forms (with a few unimportant modifications in the German statute books) have alone been acknowledged. So the Prussian law only takes cognizance in its civil code (general common law) of insanity, *mania* and idiocy, of which, moreover, in its definitions it identifies insanity and *mania.* The penal code acknowledges only insanity and idiocy. The (Rhenish) Civil Statute Book also acknowledges only idiocy, insanity and *mania* (*imbécillité, démence* and *fureur*), and the French *Code pénal* only the single category "*démence.*" Casp. For. Med. pt. vi. s. 70.

(*z*) Bract. f. 420.

(*a*) Flet. lib. vi. c. 40, f. 434.

(*b*) Bract. *ubi sup.*

(*c*) Britt. f. 167.

Memorandum of the Exchequer of 19 Edw. 1 (*d*), where, as in the writs *de ideota inquirendo* afterwards (*e*), *fatuus et ideota* apply to the whole class of the insane, whether so born or not. On the other hand, in the Statute of Prerogatives (*f*), *fatui naturales* are opposed to "*non compos mentis, sicut quidam sunt per lucida intervalla.*" St. Prerog.

Fitzherbert speaks of the Sot natural, or *fatuus et ideota*, and the man *de non sane memorie* (*g*). Staundforde opposes the idiot or fool natural to the madman, and speaks of lunacie or madness and *non sane memorie* (*h*). Fitzherbert. Staundforde.

Littleton speaks of the ideot, and of the person "*de non sane memorie, qui est à dire en Latin Qui non est compos mentis*" (*i*); on which Sir E. Coke remarks, "Many times, as here it appeareth, the Latin word explaineth the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus*, or the like, for *non compos mentis* is most sure and legall." Littleton. Coke.

Here *non compos mentis* is opposed to *idiota* as in the Statute of Prerogatives. On the other hand, in 30 Hen. 8, c. 20, we read "madness or lunacie;" in 2 & 3 Edw. 6, c. 8, "lunatic" and "idiot," and the new writ was "*de lunatico inquirendo.*"

Coke even is not true to his antithesis. In the note to Littleton (l. c.) and elsewhere, he makes *non compos mentis* the genus. There are four kinds of "*non compos mentis,*" he says: "1, idiot, or fool natural; 2, he who was of good and sound memorie, and by the visitation of God (or, as he elsewhere put it, by sickness, grief, or other accident) has lost it; 3, *lunaticus qui gaudet lucidis intervallis*, and sometime is of good and sound memorie and sometimes *non compos mentis;* 4, by his own act, as a drunkard; or, again, he that by his own vitious act for a time deprives himself of his memory and understanding, as he that is drunken" (*k*). Coke's system.

(*d*) Cf. post, p. 22, n. (*t*).

(*e*) Reg. Brev. 266; 12 Ves. 450, 451, n. (11).

(*f*) 17 Edw. 2, cc. 9, 10.

(*g*) F. N. B. f. 233 *et seq.;* 256 D.

(*h*) Staund. de Pr. Reg. 34, 36.

(*i*) See Co. Litt. 246 b.

(*k*) *Beverley's case*, 4 Rep. 124; Co. Litt. 247 a; cf. Prussian Gen. Code, tit. iv. pt. i. s. 28.

Hale's system.

Hale, C. J., adopts a similar arrangement in different terms. He takes *dementia* as the *genus*, and divides it into—1. Idiocy or fatuity *a nativitate vel dementia naturalis*. 2. *Dementia accidentalis vel adventitia*, which is (i) *quoad hoc vel illud*, or (ii) total; and, again, is (i) permanent or fixed, when it is called *phrenesis*, or (ii) interpolated, and by certain periods or vicissitudes, when it is called lunacy; and, finally, is (i) more dangerous and pernicious, commonly called *furor, rabies, mania;* or (ii) less so, such as is deep *delirium*, stupor. 3. *Dementia affectata*, namely, drunkenness (*l*).

Hardwicke, C., on *non compos mentis*.

The term *non compos mentis* was used as a general term in the old statutes of limitation (*m*), a fact which Hardwicke, C., regarded as legitimatizing it (*n*). It scarcely seems, however, that this approval indicated for *non compos mentis* a superior legal exactitude to the terms idiot or lunatic; but rather that this, and not weakness or any similar expression, was the legal alternative when the jury found insanity which was neither idiocy nor lunacy. Agreeably to this view we find in the first statute, enabling the committee to convey mortgaged estates, "idiot, lunatic, or *non compos mentis*" (*o*); and in many statutes, especially during the present century, this, or the identical form of "idiots, lunatics, or persons of unsound mind," has been adopted (*p*). At the same time other expressions are frequently met with—*e.g.*, lunatic as a general term (*q*), insane (*r*), insane or idiot (*s*), idiot or imbecile (*t*), lunatic

Various forms.

(*l*) 1 Hale, P. C. 29 *et seq.*

(*m*) 23 Eliz. c. 3, s. 3; 21 Jac. 1, c. 16, s. 7. So in the Marriage Act, 4 Geo. 4, c. 76.

(*n*) *Ex parte Barnsley*, 3 Atk. 173; cf. 2 Eq. Cas. Abr. 580, and the writ *Dum fuit non compos mentis*.

(*o*) 4 Geo. 2, c. 10.

(*p*) *E.g.*, 6 Geo. 4, c. 74; 16 & 17 Vict. c. 70; 53 Vict. c. 5.

(*q*) 1 & 2 Geo. 4, c. 15; 8 & 9 Vict. c. 100; 16 & 17 Vict. c. 96; 16 & 17 Vict. c. 97; cf. *Reg.* v. *Shaw*, L. R., 1 C. C. R. 145.

(*r*) 39 & 40 Geo. 3, c. 94; 2 & 3 Vict. c. 51; 3 & 4 Vict. c. 54; 5 & 6 Vict. c. 29; 6 & 7 Vict. c. 26.

(*s*) 1 & 2 Vict. c. 14.

(*t*) 49 Vict. c. 25, where idiots and imbeciles are expressly distinguished from lunatics. See s. 17. By the L. Act, 1890, s. 341, "lunatic" is defined as "idiot, or person of unsound mind,"

or of unsound mind (*u*), lunatic, insane, or an idiot (*x*), of unsound mind (*y*), insane persons, and persons being idiot, lunatic, or of unsound mind (*z*), and so on (*a*).

It may safely be assumed that all provisions in which any of these various terms or combinations occur, and which do not contain anything forbidding such an interpretation, will apply to the condition of mind which in that connection would be regarded as insanity; *e.g.*, a saving provision for the insane under whatever title in a statute of limitations would apply to all persons mentally incapable (*b*). It is, however, usual where a single one of these terms is used in an act to explain its application in the interpretation clause.

Although these several terms have thus lost special significance, their importance in the past has been for some purposes considerable, while their memory as distinct terms is still preserved in the medical certificates for the admission of patients into institutions for the insane (*c*). We may therefore be excused for giving to them some brief special consideration.

Idiot. Origin of the term.

(b.) Idiot, *idiota*, ἰδιώτης, signified in its original form (1) one who took no part in public affairs (*d*); then (2) one having no professional knowledge, a layman (*e*); then (3) ignorance, want of general information (*f*). So

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(*u*) 43 Geo. 3, c. 75.

(*x*) 7 & 8 Vict. c. 101.

(*y*) 5 & 6 Vict. c. 22; 24 & 25 Vict. c. 134.

(*z*) 8 & 9 Vict. c. 100, s. 114; 16 & 17 Vict. c. 70, s. 2.

(*a*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 70; 2 & 3 Will. 4, c. 40, s. 16.

(*b*) Post, Bk. II. c. 10.

(*c*) 53 Vict. c. 5, Sched. II, Form 8.

(*d*) Ἰδιώτης is opposed to an official, 1 Hdt. 32, 59; to βασιλεύς, 7 Hdt. 3; to ἄρχων, Plat. Pol. 259 b; to δικάστης, Antip. 144, 13; to πολιτευόμενος, Dem. 150, 8; to ῥήτωρ, Hyper. Euxen. 37; to στρατηγός, Xen. An. 1, 3, 4, &c.

(*e*) Thus we have ἰατρὸς καὶ ἰδιώτης, 2 Thuc. 48; ἰδιώτης ἢ τινα τέχνην ἔχων, Plat. Soph. 221, c; and it is opposed to a professed orator, Isoc. 43, a; to a trained soldier, 6 Thuc. 72; to a regular athlete, Arist. N. E. 3, 8, 8; to δημιουργός, Plat. Soph. 221, c; ἰδιωτεύειν is "to be a layman," Plat. Polit. 259, a.

(*f*) Opposed to πεπαιδευμένος, Xen. Mem. 3, 12, 1; to δεινός, Dem. 50, 7; ἰδιωτισμὸς, in Long. 31, is a homely phrase; ἰδιωτεία, uncouthness, Luc. Hist. Conscr. 27; Abd. 7.

idiota is used by Lucilius (*g*), Cicero (*h*), and others (*i*). In later Latin it stands for ignorance of literature and languages (*k*), and so idyot is used in Wiclif's Bible (*l*). In neither classical language had the word a specific legal connotation until it appeared in English law. Ducange gives it a separate paragraph, as used by the Jurisconsulti Anglici, and translates Fitzherbert's definition (*m*), which Staundforde (*n*), after premising that an idiot must be so *a nativitate*, on which see also Coke (*o*), Blackstone (*p*), and other authorities, reproduces thus:—"And the maner of the tryall of hym to bee a foole naturall appears in the sayd Natura Brevium, fol. 233. That is to say, yf hee cannot tell to twenty pence, or tell his age, or who was his father and mother, or such lyke thinges, whereby it may appear that he hath no kynd of understanding, in that that is eyther for his profite or dammage. But if hee bee learned or apt to learne then is hee no ideot, as Maister Fitzherbert there thinkes, and Greene sayth in Saver de default That if hee bee able to beget eyther sonne or daughter hee is no foole natural." To these Swinburne (*q*) adds, "that if one have so much understanding as hee can measure a yard of cloth, or rightly name the dayes in the weeke, hee that can so doe shall not be accounted an ideot or naturall foole."

Old test of idiocy.

Of such tests Hale, C. J., says, that "though they may be evidences, yet they are too narrow and conclude not always, for ideocy or not is a question of fact triable by jury, and sometimes by inspection" (*r*), thus falling back

Modern estimate.

(*g*) *Quidni et tu idem illiteratum me atque idiotam diceres*, Luc. in Non. 38, 24.

(*h*) Cic. in Verr. 4, 2, 4; in Pis. 26, 62; 16, 27, 65; pro. Sest. 51, 110.

(*i*) *E.g.*, Gell. 1, 2, 6.

(*k*) Cf. *Idiotismus*, a vulgar manner of speaking, Sen. Anti. 3, præf.; 2, 11.

(*l*) "For if thou blessist in spyrit, who filleth the place of an idyot, how shal he seie amen on thi blessyng?" 1 Corynth. c. 19.

(*m*) F. N. B. 233.

(*n*) Staundf. Pr. Reg. 34.

(*o*) 4 Rep. 124; Co. Litt. 24 a.

(*p*) Bl. Comm. 302.

(*q*) Swin. on Wills, 42.

(*r*) 1 Hale, P. C. 29; cf. per Tentenden, C. J., in *Ball* v. *Mannin*, 1 Dow, P. C., N. S. 392;

on the principle ἐν τῇ αἰσθήσει ἡ κρίσις; while Tenterden, C. J., said they were contrary to common sense. Really it may be said that the idiot of modern law, as identical with the idiot of Coke and Hale, and the *fatuus naturalis* of the Statute of Prerogatives, includes the idiot and imbecile of medicine; in other words, idiocy is congenital *dementia*.

Deaf mutes.

A person born deaf and dumb (*s*), and *a fortiori* one born deaf, dumb, and blind (*t*), is presumed to be an idiot: but the presumption may be rebutted. This point has indeed only received decision in the case of the deaf and dumb (*u*); but it was on the ground of the fact, that, under the improved methods of instruction, those persons have been rendered capable of instruction, an argument which, since the cases of Laura Bridgman and Oliver Caswell (*x*), applies to those deficient in the third sense also.

Blind and deaf mutes.

The objection to the admission of the deaf, dumb, and blind as witnesses (*y*) would rest on the fact that their evidence must almost always be secondary; it may be doubted whether it could be sustained where that argument does not apply.

Lunatic:

(c.) Lunatic, the commonest name for the insane in popular speech and modern acts, is not, though of long standing in the English language, found in the Statute Book until 33 Hen. 8 (*z*); nor was there till some time after a writ special to "lunacy." The word is derived from the late Latin "Lunaticus," used by Paulus (*a*) to

origin of the term:

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and *Lord Ely's case*, 1 Ridg. P. C. 522; 2 Eq. Cas. Abr. 581; *Prodgers* v. *Frazier*, 3 Mod. 43.

(*s*) 1 Hale, P. C. 34; Russ. on Cr.

(*t*) Co. Litt. 42, b; Perk. s. 25; Dyer, 56, a; Com. Dig. "Capacity," D. 4; 2 Bl. Comm. 497.

(*u*) *Elliot's case*, Carter, 53; *Ruston's case*, 1 Leach, Cr. Cas. 455; *Dickenson* v. *Blisset*, 1 Dick. 268.

(*x*) See Dick. Am. N. 73, 103.

(*y*) As to persons merely deaf and dumb, see *Ruston's case*, 1 Leach, Cr. Cas. 455; *Morrison* v. *Lennard*, 3 Car. & P. 127.

(*z*) 33 Hen. 8, c. 20.

(*a*) Paul. Dig. 21, 1, 43.

connote the state of intermittent insanity depending on the changes of the moon, a connection illustrated by the word σεληνιακοί, and which is not so absurd as some learned judges have deemed it (*b*). Lunatic appears in Piers Plowman (*c*) and Wiclif's Bible (*d*). In 33 Hen. 8, c. 20, it is applied to those who have become insane after birth; by Coke (*e*) and Hale (*f*), as by Paulus, with the further *differentia* of intermittency. Thus, on the best authorities, lunacy corresponds to *mania*, including *monomania*, and to adventitious *dementia*, so far as it is intermittent; it does not include adventitious *dementia* when the insanity is continuous.

its meaning.

The term lunacy introduces therefore two other terms of great importance in law; (1) that of partial insanity, or *monomania*, and (2) that of the lucid interval.

Partial insanity.

In criminal law.

1. The existence of partial insanity as a distinct mental state with particular incidents is now, after strenuous denial (*g*), generally recognized in English law. In criminal law, indeed, it was acknowledged even by Hale, C. J., who says "there is a partial insanity of mind and a total insanity, the former being either in respect of things *quoad hoc vel illud insanire*, or in respect of degrees. And this partial insanity seems not to excuse them in the committing of any offence for its matter capital" (*h*). The same principle was expressed in the answers of the judges in *M'Naghten's case*, without limitation to capital offences, and has been repeatedly acted upon (*i*).

(*b*) See 2 Tayl. Med. Jur. 474; *De Imperio Solis ac Lunæ in humana corpora et morbis inde oriundis*, by Dr. Meach; as criticisms on 12 Ves. 452.

(*c*) Piers Plowman's Vision, f. 152.

(*d*) St. Matt. c. iv.

(*e*) 4 Rep. 129; Co. Litt. 247, a.

(*f*) 1 Hale, P. C. 34.

(*g*) See in particular *Waring* v. *Waring*, 6 Moo. P. C. 341; *Smith* v. *Tebbitt*, L. R., 1 P. & M. 398; *Smee* v. *Smee*, 5 P. D. 84; and *Jenkins* v. *Morris*, 14 Ch. D. 674. It is recognized in German Forensic Medicine, Casp. For. Med. pt. vi. s. 79.

(*h*) 1 P. C. 29 *et seq.*

(*i*) *M'Naghten's case*, 8 Scott, N. R. 603; 1 Carr. & K. 135; 10 Cl. & F. 209–211; *Lord Ferrer's case*, 19 How. St. Tr. 947.

In the civil courts the doctrine has met with more resistance. Brougham, C., in *Waring* v. *Waring* (*k*), followed by Lord Penzance, in *Smith* v. *Tebbitt* (*l*), assuming the mind to be one and indivisible, held that any unsoundness, however slight or partial, would be fatal to testamentary capacity. The existence of delusion, however innocent, was admitted as a ground for confining a person in an asylum, or exposing him to a commission of lunacy (*m*). As down to the end of the last century the capacity of a person to bind himself by contract was left to the same test as determined his liability to a commission, the same result followed here too. A single delusive notion, remote from the subject-matter, might invalidate a contract as it might a will.

In the civil courts.

An absurdity so gross, though marvellously long-lived, could scarcely be immortal. In regard to civil obligations, many differentiating questions were gradually introduced, which, while practically excluding the operation of the abstract maxim, that the acts of a lunatic were void, made the nature of the particular insanity alleged important in determining its effect on the act itself, and in giving notice of the insanity to the other party (*n*). In medical certificates, the words, "and a proper person to be taken charge of and detained under care and treatment," suitably qualify the bare attribute, idiot or lunatic or of unsound mind (*o*). In inquisitions of lunacy, the person must be not merely of unsound mind, but incapable of managing himself or his affairs (*p*). Finally, in order to invalidate a will, and presumably, in the absence of notice to the other party, a deed also, where the ground against it is the existence of a

Modern view of partial insanity.

(*k*) 6 Moo. P. C. 341.

(*l*) L. R., 1 P. & M. 398.

(*m*) Cf. *Ex parte Tomlinson*, 1 V. & B. 57; *Re J. B.*, 1 Myl. & Cr. 538; *Wood's case*, 27 How. St. Tr. 1316; An Inquiry concerning the Indications of Insanity, by Dr. Conolly, p. 384; 2 Tayl. Med. Jur. 502, 44 Med. Gaz. 974; Jour. Psych. Med. 1849, p. 564; 1850, p. 14.

(*n*) Vide post, Bk. II. c. 1.

(*o*) 53 Vict. c. 5, Sched. II. Form 8; and see 44 Med. Gaz. 1161.

(*p*) 53 Vict. c. 5, s. 98, sub-s. (1).

delusion, it must be shown that the disposition is the unqualified result of the delusion itself, just as in criminal cases such delusion will only afford an excuse, if the act would have been legally excusable supposing the delusion to have been true (*q*).

The question of partial insanity generally, and in relation to the testamentary act, is most exhaustively treated by Cockburn, C. J., in the case of *Banks* v. *Goodfellow* (*r*), where the English and foreign authorities are adduced and compared.

Lucid intervals.

2. Lucid intervals. The term is as old as the Statute of Prerogatives (*s*), and was commonly included in verdicts of lunacy (*t*). The lucid interval is of importance, because, with some few exceptions, the acts of a lunatic during its continuance possess the validity and involve the responsibility of the acts of a sane man (*u*).

Wherein consisting.

For a true lucid interval it is not necessary that the state of mind which existed before the insanity should have been restored in its integrity, as Eldon, C. represents

Thurlow, C.

Thurlow, C. to have required (*x*). Lord Thurlow's own words are: "By a perfect interval I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved of excessive pressure; but an interval in which the mind, having thrown off the disease, has recovered its general habit" (*y*). From this

Eldon, C.

extreme view Lord Eldon dissented, referring to the comparatively inferior degree of capacity which is required to give validity to certain acts: he might have concurred in

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(*q*) *Greenwood's case*, cit. 13 Ves. 89; 3 Br. C. C. 444; 3 Curt. App. i—xxxi; *Dew* v. *Clark*, 1 Add. 279; *Banks* v. *Goodfellow*, L. R., 5 Q. B. 549; *Smee* v. *Smee*, 5 P. D. 84; *Jenkins* v. *Morris*, 14 Ch. D. 674.

(*r*) *Banks* v. *Goodfellow*, L. R., 5 Q. B. 549; see also, *Smee* v. *Smee*, 5 P. D. 84.

(*s*) 17 Edw. 2, c. 10.

(*t*) *Ex parte Wragg*, 5 Ves. 449; *Re Bruges*, 1 Myl. & C. 278; and cf. Co. Litt. 247, a; 1 Bl. Comm. 294.

(*u*) Bract. f. 420; *Beverley's case*, 4 Rep. 124; and vide post, Bk. II. cc. 1, 2, 11; Bk. III. c. 1.

(*x*) *Ex parte Holyland*, 11 Ves. 11.

(*y*) *Att.-Gen.* v. *Parnther*, 3 Br. C. C. 444; and see *Creagh* v. *Blood*, 8 I. E. R. 434.

the later words of Lord Thurlow, where, after alluding to the languor and debility which frequently accompany the cessation of violent *mania*, he said that the inferiority of mind would itself be a degree of evidence to show that the disease was not rooted out; the convalescent state would incline one to look forward to the removal of the disorder, but would not of itself show that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched and examined with jealousy.

One test of recovery.

The most satisfactory indication of the recovery, whether permanent or temporary, from an unsound state of mind is the conviction of the non-reality of the delusions constituting the disease (*z*). For the reasons, however, already noticed in speaking of partial insanity, it is seldom necessary now to establish a perfect lucid interval in the strict sense. The simpler question is substituted, viz., whether or not the delusion existed, did it or did it not affect the act?

Non compos mentis. Its denotation.

(d.) *Non compos mentis* (*a*)—of unsound mind. These terms employed both by statute and judicial authority to represent now a *genus* including (*b*), now a species co-ordinate with (*c*) idiocy and lunacy, most conveniently denote the second class of the insane mentioned by Coke (*d*), viz., those who were of good and sound memory, but by sickness, grief, or other accident, wholly lose their memory and understanding. This state is the permanent adventitious *dementia* or *phrenesis* of Hale, C. J. (*e*), the

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(*z*) *Re Dyce Sombre*, 1 Mac. & G. 116; Casper, For. Med. pt. vi. c. 78; and cf. the chapter on Evidence, post, Bk. IV.

(*a*) The term is used generally in Latin authors: cf. Ter. Ad. 3, 2, 12; Cic. 2 Ph. c. 38; Id. in Pis. c. 20; Tac. Ann. 15, 70; Suet. Vesp. 5; while *non compos* is used in the same sense absolutely in Sil. 4, 808.

(*b*) 5 & 6 Vict. c. 22; 24 & 25 Vict. c. 134; and by Hardwicke, C., see Shelf. on Lun., p. 5.

(*c*) See Statutes, cit. sup., pp. 11, 12; *Lord Donegal's case*, 2 Ves. sen. 408; *Re Portsmouth*, cit. ap. Shelf. on Lun., p. 104.

(*d*) 4 Rep. 124; Co. Litt. 247, a.

(*e*) 1 Hale, P. C. 29 *et seq.*

dementia or *fatuitas* of medicine. Until it was admitted, chancellors and juries felt a difficulty in treating as an idiot or lunatic a person who, though insane, was neither the one nor the other (*f*).

In the Lunacy Regulation Acts (*g*) the term "of unsound mind," with the addition "and incapable of managing himself and his affairs," was adopted as the generic test of the need for a commission, and is repeated in the Lunacy Act, 1890 (*h*). In the other Lunacy Acts (*i*) the same term by itself is used as co-ordinate with idiot and lunatic. In the Trustee Acts it is opposed to lunatic to denote one who, not having been found to be a lunatic, is incapable from infirmity of mind to manage his own affairs (*k*).

Criterion of legal insanity for different purposes.

(e.) Such are the common terms of lunacy, and, as already stated, they contain no indication of the fact that the insanity or lunacy which creates disability for one purpose will not necessarily do so for another. This is nevertheless true. There are no less than five distinct criterions of legal sanity and insanity (*l*), viz. :—

(i.) Of civil capacity (*m*). Did the contracting party at the time of the contract understand the nature of the act he was performing ?

(ii.) Of testamentary capacity (*n*). Had the testator such memory as would enable him to know what his property was, and who those persons were, who were at the time the rational objects of his bounty ?

(iii.) Of criminal responsibility (*o*). Was the prisoner

(*f*) *Ex parte Barnsley*, 3 Atk. 171 ; *Ridgway* v. *Darwin*, 8 Ves. 65 ; *Ex parte Cranmer*, 12 Ves. 445.

(*g*) 16 & 17 Vict. c. 70, s. 47.

(*h*) 53 Vict. c. 5, s. 98, sub-s. (1).

(*i*) 8 & 9 Vict. c. 100 ; 16 & 17 Vict. c. 96 ; 16 & 17 Vict. c. 97 ; 25 & 26 Vict. c. 111, &c. ; 53 Vict. c. 5, ss. 98, sub-s. (1), 341.

(*k*) 13 & 14 Vict. c. 60, s. 2.

(*l*) In German Forensic medicine there are two principal divisions :— Dispositionsfähigkeit, or civil, and Zurechnungsfähigkeit, or criminal responsibility. Casp. Med. pt. vi. s. 58.

(*m*) Post, Bk. II. c. 1.

(*n*) Post, Bk. II. c. 11.

(*o*) Post, Bk. III. c. 1.

at the time of and in regard to the act capable of knowing right from wrong ?

(iv.) On an inquisition of lunacy (*p*). Is the alleged lunatic now of unsound mind and incapable of managing himself and his affairs ?

(v.) For confinement in an asylum (*q*), &c. Is the person lunatic, idiot, or of unsound mind, and a proper person to be taken charge of and detained under care and treatment ?

Now it is obvious that here there is great variety. A negative answer to (i.), (ii.), or (iii.), and affirmative answer to (iv.) or (v.) would for the particular purpose affirm legal insanity, yet a very different degree not merely of medical insanity, but of insanity in the popular sense, would be required to obtain that verdict in one case and in another. The minimum of sanity, *e.g.*, which would warrant the patient being made the subject of a commission of lunacy, would not necessarily demand his confinement in an asylum ; while one who might with propriety be continued in confinement is not necessarily incompetent to make his will or execute a deed dealing summarily with his property.

6. *Of the Growth of the Law of Insanity in England.*

Primitive basis of the law.

Feudalism.

It is but one more illustration of the dependence of English law upon feudalism, that though their name appears on the Statute Book as early as the beginning of the 14th century, it should have been left for the 18th century to witness the first positive enactment for the benefit of lunatics, irrespective of their condition as owners of landed estates. Incompetent from his malady to perform the services on which he held his grant, the idiot or lunatic stood to his lord in the same position as the infant, while his property under the lord's management furnished the aids and compensated the services which otherwise he

(*p*) Post, p. 51.

(*q*) 53 Vict. c. 5, Sched. II., Form. 8.

could have rendered himself. Thus the lord became the guardian of his insane tenant, and was bound by the feudal custom to provide him and his family with necessary maintenance. From the first, however, it would seem

The crown.

that this duty was very imperfectly performed. Bracton mentions it as part of the duty of the judges to see that idiot heirs were duly provided for (*r*); and in the end the guardianship of the persons and estates of idiots and lunatics was taken out of the hands of the inferior lords altogether and vested in the crown (*s*).

The questions when and how this change was effected (*t*), —whether the Statute of Prerogatives, which defined the royal prerogative in idiocy and lunacy, was declaratory of existing law or created new,—when the first writ *de lunatico inquirendo* was issued,—how and when personalty other than the rents and profits of realty fell within the prerogative;—these and many other questions, however interesting, are more suitable to a book of antiquities than to a treatise on practical law. Suffice it to say, that by the first statutory enactment on the subject, 17 Edw. 2, cc. 9, 10, the king became the owner of an idiot's lands for the life of the idiot, subject to providing necessary maintenance for him and his household, while of the lunatic's estate he was merely a trustee, bound to account for the unapplied moneys on the recovery or death of the lunatic (*u*).

Property of the insane, how brought under the control of the crown.

The method of bringing the property of an idiot or lunatic under the control of the crown was that of inquisition by sheriff, escheator or commissioner, in the manner

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(*r*) Bract. f. 421; Staundf. de Pr. Reg. 33.

(*s*) Flet. p. 6; see Reeves's Hist. of Eng. Law, vol. 2, p. 307; and cf. 2 Inst. 14; 4 Rep. 124 b; Hob. 215.

(*t*) The curious may consult Bract. f. 421; Britt. f. 167; Flet. f. 6; Mem. Scacc. 19 Edw. 1, R. 1; 20 Edw. 1, R. 13; 23 Edw. 1, Rr. 10, 17; 17 Edw. 2, cc. 9, 10; Staundf. de Pr. Reg. 33 *et seq.*; Fitzh. N. B. 232 A; 4 Rep. 126; 2 Inst. 14; Bac. Abr. "Idiots and Lunatics" (C); 2 Ves. jun. 71; 2 Sch. & Lef. 432; 1 Ridg. P. C. 213.

(*u*) Vide post, pp. 25 *et seq.*

usual in other cases (*x*). The king administered the estate of these his wards by delegation, granted sometimes for valuable consideration, sometimes gratuitously; but the grantee of a lunatic's lands being, as the crown itself was, liable to an account (*y*). The general supervision, as in the case of other crown property, belonged to the province of the Exchequer (*z*).

Nature of that control.

Gradually, however, partly perhaps from the sympathy of juries, partly from a growing sense of justice, the position of idiots became assimilated to that of lunatics, and the relation of the crown to both classes approached more nearly the relation of trustee to beneficiary, as it is understood in modern times (*a*). So Lord Erskine, following consciously or unconsciously the words of Fitzherbert, described the prerogative as being simply this, that it falls to the crown to take care of those who cannot take care of themselves (*b*).

Jurisdiction of the Lord Chancellor.

The care and commitment of the persons and estates of idiots and lunatics thus became a matter affecting the royal conscience, and the chancellor as at once the keeper of that conscience, the judge in matters of trust, and the presiding officer of the Court of Chancery, from the common law side of which the writs for inquisitions issued, acquired the immediate jurisdiction in respect of these classes, and administered the trust on behalf of the crown. The establishment of the Court of Wards, in the reign of Henry VIII., for a while interrupted the jurisdiction of the Lord Chancellor; but on the abolition of that court at the Restoration it was revived, and the same officer, or the person or persons who for the time being held the great seal, continued to administer the charge with but little variation in practice

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(*x*) Vide post, p. 47.

(*y*) Vide post, pp. 117, 118.

(*z*) Madox, Hist. Exch. 1, 10, 9.

(*a*) Post, p. 25.

(*b*) *Ex parte Cranmer*, 12 Ves. 449; cf. Staundf. Pr. Reg. 33; 2 Inst. 14; 4 Rep. 126; Bac. Abr. "Idiots and Lunatics" (C); Dyer, 25; 1 Bl. Comm. 293; 1 Bligh, N. S. 348; *Att.-Gen.* v. *Tyler*, 1 Dick. 378; *De Manneville* v. *De Manneville*, 10 Ves. 52; *Lord Ely's case*, 1 Ridg. P. C., App. 518; *Re Windham*, 8 Jur., N. S. 448; 1 Fonbl. Eq., Bk. ii. ch. 2, s. 1.

until modern times (*c*). The last thirty-seven years have been marked by considerable changes, as well in the officers who are intrusted by the Queen's sign manual with the care and commitment of idiots and lunatics, as in the practice relating to the subject. The result of these changes is the subsisting law, which it is the object of this treatise to exhibit.

(*c*) Post, pp. 28 *et seq.*

BOOK I.

Of the Care and Custody of the Persons and Estates of the Insane.

PART I.

WHO HAVE BEEN FOUND LUNATIC BY INQUISITION.

CHAPTER I.

OF THE COURT OF LUNACY.

SECT. 1.—*Of the Prerogative of the Crown.*

THOUGH the jurisdiction in lunacy as at present exercised is almost entirely the creature of statute, it is in its origin due to the delegation by the crown of the interest which it takes by virtue of its prerogative in the estates of lunatics duly found to be so, and of the trusts to which that interest is subject. This prerogative (*a*), whatever its date—and though Staundforde places it in Edward I.'s reign (*b*), it was probably earlier (*c*)—was definitely stated in the Statute of Prerogatives of 17 Edw. 2, the 9th chapter of which relates to idiots, the 10th to lunatics. By this statute the king took the rents and profits of the idiot's land during the life of the idiot, finding him his necessaries, and on his death rendering the land to his right heirs. It was his duty, on the other hand, to provide that the lands and tenements of

The origin and nature of the prerogative.

Statute of Prerogatives.

(*a*) For the authorities on the prerogative, vide ante, p. 22, n. (*t*).

(*b*) St. Pr. Reg. 33.

(*c*) Bracton de Leg. f. 421 ; Fleta, Bk. 6, c. 40 ; Mem. Scacc. Trin. 19 Edw. 1 ; Pasch. 20 Edw. 1 ; Trin. 23 Edw. 1 ; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. at p. 692.

lunatics were kept safely, without waste or destruction, that they and their family might live and be competently maintained out of the income of the same, and that the residue over and above their reasonable maintenance might be kept for their use, to be delivered to them so soon as they should have recovered their memory. The king might not take any part of the income, the residue of which, in case the lunatic died without recovery, was applied for the benefit of his soul at the discretion of the ordinary, or, as in more modern times, in a due course of administration.

The condition of idiots and lunatics compared.

On this statute notice, 1st, the distinction between idiots and lunatics. The clemency of the crown (*d*) and the pity of juries (*e*) gradually assimilated the condition of idiots and lunatics, though the income of idiots' estates is mentioned by Blackstone (*f*) even, as a source of revenue. The Lunacy Regulation Act, 1853, practically abolished the distinction by confining the inquiry on a commission to the state of the alleged lunatic at the present time, and raising an uniform issue (*g*). But idiots and imbeciles are expressly distinguished from lunatics by the Idiots' Act, 1886, for the purposes of that act (*h*).

Real and personal property.

2nd. That realty and the income of realty are alone considered. Fitzherbert speaks as if goods and chattels were, equally with the lands and tenements, the objects of royal prerogative in the introduction to a writ which directs inquiry as to the latter only (*i*). To Staundforde it is an open question whether leaseholds were comprised (*k*). In the present day personalty no less than realty is under the control and protection of the crown.

Interests of the idiot which are not taken by the crown.

3rd. That notwithstanding the statute there were certain interests of the idiot which the crown never took to itself, viz., rights of entry and action (*l*), and the actual legal

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(*d*) 1 Ridg. P. C. 520; and cf. *Ex parte Watson*, Jac. 161.

(*e*) 1 Bl. Comm. 292.

(*f*) Ibid.

(*g*) 16 & 17 Vict. c. 70, s. 47; 53 Vict. c. 5, s. 98.

(*h*) 49 Vict. c. 25, s. 17.

(*i*) F. N. B. 232.

(*k*) Pr. Reg. 36.

(*l*) St. Pr. Reg. 35; Vin. Abr. tit. "Lunatics" (B 2), pl. 1; Note of Hale, C. J., to F. N. B. 232;

estate in the land (*m*). The conflicting rights of the crown and the inferior lord to enjoy the idiot's copyholds have been curiously investigated (*n*). Since the beneficial interest has been practically abolished, the privilege of administering them upon trust for the idiot has been left to the crown (*o*).

Interests of the lunatic which are taken by the crown.

On the other hand, there are certain interests of the lunatic which the crown assumed, and indeed still assumes, not as trustee, but as absolute owner, *e.g.*, the presentation to a living (*p*), and visitatorial rights (*q*).

Distinction between idiots and lunatics practically abolished.

It would be unprofitable to consider further the curious interest taken by the crown in an idiot's estate, or the ingenious questions that have arisen as to the legal incidents attending it (*r*). For such purposes the idiot is now included under the general term lunatic, and what is said of the latter may, in the absence of special remark, be applied to the former also.

The prerogative not favoured.

The prerogative was never favoured at common law (*s*), and the chancellor was always cautious in exercising it. It is strictly confined to the life of the lunatic (*t*), and, until statutory enactment supplied its deficiency, many inconveniences were left unremedied (*u*) from the unwillingness of the court to assume an authority which did not belong to it by the ancient jurisdiction, as that might press sorely on the liberty of the subject (*x*).

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and cf. 1 Hen. 7, c. 24; 29 Edw. 3, c. 43.

(*m*) 4 Rep. 126; St. Pr. Reg. 34, 36.

(*n*) Bac. Abr. "Idiots and Lun." (C); Watk. Gilb. Ten. 291, 400; Vin. Abr. "Lun." B. 1, pl. 3; *Cocks* v. *Darson*, Hob. 215 a; Noy, 27; *Drewry* v. *Fitch*, Hutt. 16; *Evers* v. *Skinner*, Cro. Jac. 105; *John Roger's case*, Dyer, 302 b.

(*o*) Cf. 16 & 17 Vict. c. 90, ss. 108—111.

(*p*) Com. Dig. Idiots, C.

(*q*) *Att.-Gen.* v. *Dixie*, 13 Ves. 519.

(*r*) See *Tourson's case*, 8 Rep. 170; St. Pr. Reg. 35; Moo. 4; Dyer, 302 b; And. 23; *Re Roberts*, 3 Atk. 312; *Prodgers* v. *Lady Phrasier*, 2 Ch. Cas. 70; *Ex parte Watson*, Jac. 161.

(*s*) *Tourson's case*, 8 Rep. 170; F. N. B. 202.

(*t*) 4 Rep. 127 a; St. Pr. Reg. 35.

(*u*) *E. g.*, particularly in the matter of costs; vide post, Bk. I. Pt. i. c. 20.

(*x*) *Ex parte Barnsley*, 3 Atk. 171; *Ridgway* v. *Darwin*, 8 Ves. 65; *Ex parte Cranmer*, 12 Ves. 445.

Sect. 2.—*Of the Constitution of the Court of Lunacy.*

Sketch of the jurisdiction in lunacy.

Exchequer.

In the beginning the management of the lands of idiots and lunatics, under the protection of the crown, was with the Exchequer (*y*). As the relation of the crown became that of a trustee, it passed into the hands of the lord chancellor. By 32 Hen. 8, c. 46, which created the Court of Wards, that court was required to survey and order the lands and maintenance of idiots; no mention is made of lunatics, but it appears from Ley that they were included (*z*). By 12 Car. 2, c. 24, the Court of Wards was abolished (*a*), and idiots and lunatics came once more under the immediate care and commitment of the crown. Then, "in order to save repeated applications and the very shadow of undue partiality" (*b*), the crown once more delegated this "care, commitment, and dispose by warrant to some high officer or officers of justice or state, and conferred upon him or them the right to make grants of the estates of idiots and lunatics without any further or special warrant from the crown" (*c*). Until recently the keeper of the great seal was the person, and the only person, ordinarily selected (*d*). Since the Revolution it has been the rule that that seal must be held by the lord chancellor whenever the office is in existence (*e*), and hence the notion formerly prevalent that the lord chancellor was of necessity intrusted with the custody and commitment of the persons of idiots and lunatics and of their estates. The practice was certainly recommended by convenience, the chancellor

Court of Wards.

Lord chancellor.

Reasons recommending the lord

(*y*) See Mem. Scacc. Trin. 19 Edw. 1; Pasch. 20 Edw. 1; Trin. 23 Edw. 1.

(*z*) Account of the Court of Wards, p. 1.

(*a*) It had been discontinued on the 24th Feb. 1645. See further, *Corp. of Burford* v. *Lenthall*, 2 Atk. 553; *Smith* v. *Smith*, 3 Atk. 304; *Cary* v. *Bertie*, 2 Vern. 342.

(*b*) *Re Heli*, 3 Atk. 635; cf. 2 Ves. jun. 72.

(*c*) 2 P. Wms. 118; and cf. the warrant to the lord chancellor in Lunacy, Lord Campbell's Lives of the Chancellors, vol. 1, p. 14; but see *Lysaght* v. *Royse*, 2 Sch. & Lef. 153.

(*d*) *Sherwood* v. *Sanderson*, 19 Ves. 283.

(*e*) Lord Campbell, op. cit. vol. 1, p. 20.

uniting in himself many offices and jurisdictions relating or applicable to the insane. chancellor for the office.

Thus, 1st. He was the presiding officer of the Court of Chancery, from the common law side of which the writs of attendance in matters of lunacy issued, and to which the inquisitions were returnable (*f*). Lord Campbell expresses his opinion that the lord chancellor might issue a commission irrespective of the authority delegated by the sign manual (*g*).

2nd. He was keeper of the king's conscience, and therefore continued to direct and control the administration of the estate by the committee, though the estate having been committed, he was, so far as the sign manual was concerned, *functus officio* (*h*), and, by virtue of the general power of the Court of Chancery, he could enforce his orders by attachment (*i*).

3rd. The chancellor was a judge in equity, and could bring his ordinary jurisdiction to the help of his lunacy jurisdiction (*k*).

The keeper of the great seal is, however, no longer the only person intrusted with the custody and commitment of the persons of idiots and lunatics and of their estates. Shortly after the creation of the office of lords justices of appeal in Chancery a similar warrant was made out to each of them (*l*), and provision made for extending to them statutory jurisdiction (*m*). The manner in which the juris- Lords justices of appeal.

(*f*) *Re Fitzgerald*, 2 Sch. & Lef. 438 ; 5 Rep. 52 a ; 12 East, 111 ; F. N. B. 233. *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*g*) Campb. Lives of the Chanc. vol. 1, p. 14 ; cf. 3 Bl. Comm. 48, 427 ; 2 Story, Eq. Jur. 678.

(*h*) *Ex parte Grimstone*, 2 Amb. 707 ; cf. *Re Fitzgerald*, 2 Sch. & Lef. 438 ; *Ex parte Lund*, 6 Ves. 783 ; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*i*) There are several instances of committals for disobedience to orders in Lunacy ; *e.g.*, *Re Lord Wenman*, 1 P. Wms. 702 ; and see *Ex parte Jones*, 13 Ves. 237.

(*k*) Cf. *Sherwood* v. *Sanderson*, 19 Ves. 283.

(*l*) *Re Pattinson*, 21 L. J., N. S., Ch. 280 ; *Re Waugh's Trusts*, 2 D. M. & G. 279.

(*m*) 15 & 16 Vict. c. 55, s. 11 ; 15 & 16 Vict. c. 87, s. 15 ; 16 & 17 Vict. c. 70, s. 2.

Statutory powers.

diction might be exercised was somewhat complicated, but may be concisely stated as follows. The powers, authorities and duties under the Lunacy Regulation Acts of the lord chancellor, intrusted as aforesaid, might be had, exercised and performed as well by the lord chancellor, acting either alone or jointly with both or either of the lords justices, as by both the lords justices acting jointly apart from the lord chancellor (*n*). The statutory jurisdiction in lunacy existing on the 1st July, 1852, by virtue of any act not since repealed (*o*), any jurisdiction by the Lunacy Regulation Act conferred on the lords justices *eo nomine*, and the non-statutory jurisdiction, were exerciseable by either lord justice or by the lord chancellor sitting alone (*p*).

Effect of Lunacy Act, 1890.

By the Lunacy Act, 1890 (*q*), the Lunacy Regulation Acts and other acts relating to lunatics have been consolidated. Under that act the jurisdiction of the judge in lunacy is exercised either by the lord chancellor entrusted by the sign manual with the care and commitment of the custody of the persons and estates of lunatics acting either alone or jointly with any one or more of such judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such judges as aforesaid (*r*).

No other judge can exercise the jurisdiction.

Neither can the master of the rolls (*s*) nor could any of the vice-chancellors (*t*), nor can any other judge of the High Court of Justice or Court of Appeal, exercise the special jurisdiction in lunacy (*u*).

"Lord chancellor."

Moreover, when in the Lunacy Act the term lord chancellor merely is used, no other person, has jurisdiction to act (*x*).

(*n*) 16 & 17 Vict. c. 70, s. 2.

(*o*) 15 & 16 Vict. c. 87, s. 15; *Re Burton*, 18 L. T. 85.

(*p*) 16 & 17 Vict. c. 70, s. 2.

(*q*) 53 Vict. c. 5.

(*r*) 53 Vict. c. 5, s. 108.

(*s*) *Ames* v. *Parkinson*, 2 Phill. 388; 1 Coll. on Lun. p. 105.

(*t*) 53 Geo. 3, c. 24; 5 Vict. c. 5; 14 Vict. c. 4; 15 & 16 Vict. c. 80; and cf. *Re Shorrocks*, 1 M. & C. 31; *Anon.*, 5 Sim. 322; *Re Mount*, 12 L. J., N. S., Ch. 95.

(*u*) Cf. generally *Winthrop* v. *Winthrop*, 1 Coop. T. L. C. 196; *Farebrother* v. *Welshman*, 3 Drew. 122; 36 & 37 Vict. c. 66, s. 17.

(*x*) 53 Vict. c. 5, s. 108.

"Judge in lunacy."

Throughout this Treatise the lord chancellor in lunacy or the court of lunacy or the judge will be used in the same sense as the judge in lunacy as above explained.

The judges in lunacy sit as additional judges of the Chancery Division for the purpose of making orders which require to be made in the high court as well as in lunacy in pursuance of the request of the lord chancellor under s. 51 of the Judicature Act, 1873 (*y*). But they will only make orders under this jurisdiction in aid of their jurisdiction in lunacy, and *semble*, they would not make an order in the Chancery Division only (*z*). Power is given to the county courts in certain cases to deal with properties under £200 in value (*a*). The powers of the judge in lunacy extend to property within any British possession (*b*).

County court.

Sect. 3.—*Of the Relation of the Courts of Lunacy in England and Ireland.*

Jurisdiction of the lord chancellor of Ireland.

The lord chancellor of Ireland exercises, whether by virtue of the Queen's sign manual or under a series of statutory legislation, terminating in and for the most part consolidated by the Lunacy Regulation Act for Ireland, 1871 (*c*), very much the same jurisdiction in Ireland as the judge in lunacy exercises in England and Wales.

Equality between the English and Irish courts.

There is a perfect equality of jurisdiction between the respective courts, and the proceedings taken under the great seal in either are recognized in the other. Applications to set aside proceedings must be made to the court which originally made the order (*d*).

Transcript of the record of one court

The method directed, when it is desired that an inquisition taken on a commission issued under, or a writ

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(*y*) See *In re Platt*, 36 Ch. D. 410, where the terms of the request are given. *Re Armfield*, W. N. 1889, p. 208; *In re Tate*, 20 Ch. D. 135.

(*z*) *In re Barber*, 39 Ch. D. 187.

(*a*) 53 Vict. c. 5, s. 132.

(*b*) 53 Vict. c. 5, s. 110.

(*c*) 34 & 35 Vict. c. 22.

(*d*) *Re B., a lunatic*, 1 Ir. Eq. Rep. 181; *In re Talbot*, 20 Ch. D. 269; formerly it was not so, see the *Duchess of Chandos' case*, 1 Sch. & Lef. 301.

received in the other.

of *supersedeas* issued under the great seal of the United Kingdom or the great seal of Ireland respectively, should be acted upon in Ireland or England respectively, is for the "proper officer" (who would be found in the office of the masters), under the judge in lunacy in England or the lord chancellor in lunacy in Ireland, as the case may be, to transmit a transcript of the record of the inquisition or of the writ to the registrar in lunacy in Ireland or the High Court in England, as the case may be. This transcript will thereupon be entered and be of record of the court to which it has been transmitted; it will, subject to the discretion of the judge in lunacy in that court, be acted upon by him and be of the same validity and effect, to all intents and purposes, as if the inquisition or *supersedeas* had been instituted in his own court (*e*). This provision, which is dictated by a regard for convenience and economy, does not, however, extend to limit the jurisdiction of either court by the other. Particular illustrations of this statement will appear hereafter (*f*).

Sect. 4.—*Of Appeals in Lunacy.*

The appeal from the court touching any orders made in lunacy lay not to the Court of Appeal, but, as being a matter of prerogative, immediately to the Queen in council (*g*).

By the 18th section of the Judicature Act, 1873 (36 & 37 Vict. c. 66), all jurisdiction vested in or capable of

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(*e*) 53 Vict. c. 5, s. 107; cf. *Re Lord Creighton*, cit. ap. Shelf. Lun., p. 23; *Hartland* v. *Atcherley*, 7 Beav. 53.

(*f*) Post, pp. 98, 99, and *In re Talbot*, supra.

(*g*) *Samuel Pitt's case*, 3 P. Wms. 107, and n. (A); *Rochfort* v. *Ely*, 1 Br. P. C. 450. As to the alleged jurisdiction of persons intrusted, &c., to alter or discharge orders of their predecessors, see 4 Br. C. C. 235, 238; *Re Lanesborough*, Ll. & G. C. t. Pl. 503; *Grosvenor* v. *Drax*, and as to appeals to the House of Lords, see *Re Windham*, 31 L. J. Ch. 724.

being exercised by her Majesty in council or the judicial committee of her Majesty's Privy Council upon appeal from any order in lunacy made by the lord chancellor, or any other person having jurisdiction in lunacy, is vested in the Court of Appeal constituted by the act. By the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), there is an appeal from the Court of Appeal to the House of Lords.

So far as the editors are aware there has never been an appeal from an order in lunacy since 1873, but having regard to the above enactment it appears that an appeal would lie to the Court of Appeal constituted by the Judicature Act, and not as formerly to the Privy Council.

SECT. 5.—*Of the Masters and Chancery Visitors in Lunacy.*

Two classes of officers.

As the law now stands the officers subject to the lunacy jurisdiction belong to one of two classes, the main duties of which are judicial and administrative on the one hand, and on the other relate to inspection and supervision. To the former class belong the masters; to the latter the visitors of lunatics. Besides these officers there are sundry clerks attached to the several offices.

Masters in lunacy.

The masters in lunacy are two in number, and hold office during good behaviour. The qualification for the place is the position of barrister-at-law of not less than ten years' standing (*h*).

Duties.

The duty of the masters in lunacy combines the judicial duties of the commissioners named in commissions in the nature of writs *de lunatico inquirendo* (*i*), the administrative and ministerial duties in matters of lunacy formerly possessed by the masters in ordinary of the Court of Chancery (*k*), part of the ministerial duties of the old office

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(*h*) 53 Vict. c. 5, s. 111.

(*i*) 16 & 17 Vict. c. 70, s. 7; 53 Vict. c. 5, s. 111; and vide post, pp. 98, 99, *et seq.*

(*k*) 16 & 17 Vict. c. 70, s. 8; 53 Vict. c. 5, s. 111.

of clerk of the custodies (*l*), and duties analogous to those formerly performed by the registrar in lunacy under ss. 92, 100, and 101 of the L. R. Act, 1853 (*m*).

Powers, joint and several.

The statutory powers of the masters in lunacy are joint and several, and the execution of their duties is subject to the rules in lunacy, the provisions of the Lunacy Act, and the special orders of the judge in lunacy (*n*). The judicial functions of the masters in lunacy will receive a more convenient treatment when the subject of commissions of lunacy is under consideration. We may for the present confine our attention to their proceedings, powers, and authorities in their administrative and ministerial capacity.

Proceedings in the masters' office.

Management of lunatic's estates by the master.

Under the present system, the management of the persons and estates of lunatics so found by inquisition is mainly governed by the masters' certificates confirmed by the judge (*o*). Formerly every detail had to come before the lord chancellor in the first instance on petition, which was followed by an order for reference. A practice which was necessarily productive at once of expense and of delay. By the L. R. Act, 1853, a more direct process was inaugurated. The masters were at liberty, without an order of reference, to receive any proposal, and conduct any inquiry relating to the estate or person, and to report thereon, if and when they were of opinion that if any application were made to the lord chancellor in lunacy concerning the matter of any such proposal or inquiry, a reference thereon would be made to the masters (*p*). This provision in the L. R. Act, 1853, was even extended in respect of proposals, or inquiries respecting the managing, repairing, setting, and letting the estate, which the masters were to be at liberty to receive and make respectively without an order of reference in any case they might think proper, and of course to report thereon (*q*). It was also enacted by the L. R. Act, 1853,

(*l*) 16 & 17 Vict. c. 70, s. 11; 53 Vict. c. 5, s. 111.
(*m*) R. L. 1890; 53 Vict. c. 5. s. 111.
(*n*) 53 Vict. c. 5, s. 111, sub-s. (2).
(*o*) R. L. 1890, 28, 63–66.
(*p*) 16 & 17 Vict. c. 70, s. 70.
(*q*) *Ib.*, s. 69.

that when the masters, without an order of reference, received any proposal or proceeded in any inquiry relating to the estate not respecting the managing, repairing, setting or letting thereof, or any proposal or inquiry whatsoever respecting the person, any person attending before them might apply by petition to the lord chancellor in lunacy, and thereupon the masters, pending the application, ceased from proceeding on the proposal or in the inquiry unless the lord chancellor in lunacy directed otherwise (*r*). By orders made in 1883 (23, 33), proposals were abolished and all proceedings before the masters were ordered to be commenced by summons (*s*). The Lunacy Act, 1890, which came into operation on May 1st of the same year, has repealed the L. R. Act, 1853, and has consolidated all the prior lunacy legislation, and the rules in lunacy of 1890, have repealed the former orders and constitute the present code of procedure. Under the act and rules of 1890, the masters have similar powers to those just enumerated.

Beside these general powers the masters are authorized to make inquiries and certify on certain special points relating to the next of kin, and other subjects which will be particularized hereafter (*t*).

Evidence before the masters.

The masters may direct the evidence in the matter of a lunatic or any particular proceedings to be taken orally or partly orally and partly by affidavit (*u*). They may administer any oath and take any affidavit and may summon any person to give evidence before them, and every person so summoned shall be bound to attend as required by the summons (*v*). They may administer oaths to any witness whether his deposition or affidavit is to be used before themselves or not, and recognizances may be taken and acknowledged before them (*x*). Persons making

(*r*) 16 & 17 Vict. c. 70, s. 71.

(*s*) See now R. L. 1890, 15, 100.

(*t*) R. L. 1890, 27—46.

(*u*) R. L. 1890, 85. Foreign affidavits must either be filed or be made exhibits. *Ex parte Hewitson*, 1 W. R. 58.

(*v*) 53 Vict. c. 5, s. 114; R. L. 1890, 86.

(*x*) R. L. 1890, 86.

affidavits are liable to be cross-examined and re-examined before the masters (*y*).

They may cause to be issued such advertisements as seem to them expedient with reference to any application before them (*z*).

Power to dispense with or require summonses.

The masters may also, if they think fit, dispense with any summons ordinarily taken out in the course of the proceedings before them, and require any party attending before them to take out a summons for a particular purpose, or within a particular time, and fix the time at which any particular summons shall be returnable before them, or at or within which any proceeding necessary or proper to be taken before them shall be taken, and may proceed *de die in diem*, or adjourn the proceedings before them, as they think fit (*a*).

To fix appointments.

Certificates.

The results of the masters' inquiries are usually embodied in certificates, which are to be in the form given in the schedule to the rules in lunacy so far as applicable (*b*). But they may on request or otherwise, make a separate certificate or state any matters specially with respect to the subject-matter of a certificate; and they may make a special certificate on any matter if they think fit (*c*). They may communicate personally with the judge with regard to any matter pending before them when any point appearing to them to be novel or difficult arises, and they shall, when requested by the judge so to do, attend to give any information or assistance he may require (*d*). Certificates and minutes of orders are to be signed by the masters at an adjournment made for that purpose, and notice is to be given to the parties where the certificate and minutes have been prepared, without any attendance. The parties may consent to the signature without any adjournment (*e*).

(*y*) R. L. 1890, 88.
(*z*) R. L. 1890, 87.
(*a*) R. L. 1890, 99.
(*b*) R. L. 1890, 28.
(*c*) R. L. 1890, 62.
(*d*) R. L. 1890, 21.
(*e*) R. L. 1890, 63.

Objections to certificates.

Any person objecting to a certificate (not being a certificate to be acted on without further order), or to the minutes of any order, may take the opinion of the judge thereon by summons to be issued within eight days after the signature by the masters of the certificate or minutes, to be served eight clear days before the return thereof (*f*). The judge may, after hearing the parties or their counsel or solicitors, adjourn the application into court, or refer the same to the masters for inquiry or further inquiry(*g*). If no summons be taken out the certificate (not being a certificate to be acted on without further order), is submitted to the judge for approval without attendance of parties (*h*). Every certificate (not being a certificate to be acted on without further order), if approved, is signed by the judge either eight days (or before with the consent of parties) after the signature by the masters, or after the hearing and disposal of a summons thereon (*i*).

Certificate binding.

A certificate, when signed by the judge, is binding on all parties to the proceedings (*k*).

Old practice.

Under the old law objections to the reports of the masters were brought before the court in the form of cross petitions against the confirmation of the reports. This method has now been abolished; and now no certificate is to be brought before the judge by petition, unless the judge so directs (*l*). In the absence of direction the extra costs occasioned by a petition will not be allowed (*m*).

Modern practice.

Applications in lunacy.

Applications under the Lunacy Act, 1890, for an order for inquisition for a traverse and for vesting orders where a lunatic is a trustee, are to be made by petition (*n*). It is to be noticed that rule 56 of the L. R., which deals with applications for vesting orders, speaks of "the summons," as though all applications for vesting orders were to be by summons. Apparently the word "petition"

(*f*) R. L. 1890, 64.
(*g*) R. L. 1890, 19.
(*h*) R. L. 1890, 65.
(*i*) R. L. 1890, 66.
(*k*) Ib.
(*l*) R. L. 1890, 67.
(*m*) R. L. 1890, 17.
(*n*) R. L. 1890, 12, 13.

has been omitted in the last-mentioned rule by an oversight. Every petition for an order for inquisition and for a traverse, and the evidence in support thereof are filed in the masters' office, and laid before the judge out of court (*o*). All other applications under the Lunacy Act, 1890, than those mentioned above are, unless the judge otherwise directs, to be made by summons at chambers before the masters (*p*). An application by a person out of the jurisdiction will not be heard unless the applicant comes within the jurisdiction, or makes a next friend or solicitor co-petitioner, or gives ample security for costs (*q*). The masters in all cases, except petitions for inquisition or traverse, consider the summons or petition and the evidence, and certify the result of the evidence unless the judge dispenses with a certificate, and prepare minutes of such order as they think should be made, and lay the certificate and minutes before the judge (*r*) out of court (*s*).

Summonses in lunacy.

Summonses are prepared by the parties and sealed by one of the clerks in the masters' office with the seal of the office, and a copy of the summons is left at the masters' chambers by the party obtaining the same (*t*). Subject to the provisions of the rules a summons before the masters is to be served at least two clear days before the return thereof, unless the masters direct the summons to be returnable within a shorter time after service, and it is to be in the form given in the schedule to the rules, with such variations as circumstances require, and addressed to all the persons on whom it is to be served (*u*).

No summons is to be supported by a statement of facts or proposal (*x*).

Petitions in lunacy.

For the practice on petitions in lunacy, as stated in the first edition of this work, the reader is referred to the note (*y*).

(*o*) R. L. 1890, 14.
(*p*) R. L. 1890, 15.
(*q*) *In re Grossett*, Reg. Bk. June, 1867.
(*r*) R. L. 1890, 18.
(*s*) R. L. 1890, 19.
(*t*) R. L. 1890, 93.
(*u*) R. L. 1890, 94.
(*x*) R. L. 1890, 100. not re-enacted
(*y*) Petitions in Lunacy were presented at the Masters' Office and on being answered in the usual

Orders in lunacy.

The judge may make orders on petitions and summonses without attendance of counsel, solicitor, or parties, or, after attendance, may adjourn the summons or petition into court, or refer the same to the masters for inquiry or further inquiry (*z*).

In all other cases than those above-mentioned the certificate is submitted to the judge for confirmation without attendance of parties (*a*).

Office copies to be evidence.

It is also enacted that every office copy of the whole of an order or report confirmed by *fiat* purporting to be signed by a master, and sealed or stamped with the seal of the masters' office, and every office copy of a certificate in lunacy shall at all times, and on behalf of all persons, and whether for the purposes of the Lunacy Act or otherwise, be admitted as evidence of the order, report, or certificate of which it purports to be a copy, without any further proof thereof.

Money orders to be acted on.

Where an order relates to the payment, transfer, carrying over, or depositing of any cash, stocks, funds, annuities, securities, or other effects into or in court to the credit of the matter of a lunatic, or to the payment, transfer, or carrying over, or other disposal by the paymaster-general of any cash, stocks, funds, annuities, securities, or other effects standing in his name or deposited in his custody to

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form, were set down for hearing on the next Petition day which must be at least two clear days after the presentation. A Petition could only be heard on a day not being a Petition day by special leave. Copies were served upon the next-of-kin and others having liberty to attend the proceedings or who had lodged caveats against the order sought by the Petition. On order made upon Petition, the Masters were furnished with the briefs in the usual way and prepared minutes of which copies were taken by the parties. A day was then appointed for settling them, of which the solicitor having the carriage of the order gave notice to the other parties. On the minutes being settled, the order was engrossed in the Masters' office and signed by the Court that made it. It was then entered in a book and the original delivered to the solicitor having the carriage of the Order. The Petition had to be filed before an order could be passed. See Elmer, p. 41 ; 16 & 17 Vict. c. 70, s. 100.

(*z*) R. L. 1890, 19.

(*a*) R. L. 1890, 65.

the credit of the matter of a lunatic, or of any cash, stocks, funds, annuities, securities, or other effects to or in which a lunatic is entitled or beneficially interested, and which are not standing to the credit of a cause or matter depending in the high court, the paymaster-general and the Bank, and all other persons, shall act upon an office copy of the order (*b*).

Orders entitled as well in an action as in lunacy are drawn up in duplicate, and filed both in the high court and in lunacy (*c*). Orders made in lunacy only will be drawn up, signed and entered by the masters (*d*).

Almost the entire management of the lunatic's estate and of his person is carried on more or less directly through the masters' office; as will be seen hereafter, it is but little that persons to whom the care of the person and estate of the lunatic is entrusted can do without previously obtaining, upon application to the office, the sanction of the court.

Parties how represented before the masters.

Parties before the masters are chiefly represented by their solicitors, although the masters have power to require their personal attendance when necessary. But the masters are as far as possible to prepare their certificates without attendance of solicitors or parties (*e*).

For the parties to attend the proceedings before the masters the reader is referred to Book I. pt. i. chap. vii. *post.*

With these general remarks on the practice of the masters' office the subject must be quitted for the present. Involved as it is with almost every detail of the lunacy administration of the lord chancellor, its several particulars

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(*b*) 53 Vict. c. 5, ss. 144, 145.

(*c*) Elmer, p. 41.

(*d*) R. L. 1890, 59.

(*e*) R. L. 1890, 61. Further instances of economy are to be found in the rules as to the costs of unnecessary inquiries (43) as to the omission of certain inquiries in proper cases (34, 35, 36) in the power of dispensing with strict proof of pedigree (37); the power to dispense with attendances (38, 39); to consolidate matters and use evidence filed in other matters (41); in the appointment of a guardian for an infant without applying to the High Court (40); to inquire as to delay (10), &c.

will be more conveniently treated under the various heads into which that administration is hereinafter distributed for the purpose of minute consideration.

The registrar in lunacy.

Another officer of the lord chancellor in lunacy was the registrar (*f*), who held office during good behaviour, and who in addition to the particular duties imposed by statute upon him as registrar, divided with the masters those of the obsolete office of clerk of the custodies of idiots and lunatics (*g*). By the Lunacy Orders of 1883, which came into force on Feb. 1st of that year, the post of registrar in lunacy was abolished and his duties transferred to the masters (*h*), who now perform the duties formerly performed by the registrar (*i*).

By r. 9 of the R. L. 1890, such one of the masters or their clerks as the masters, with the concurrence of the lord chancellor direct, shall attend in court upon the hearing of any application in lunacy, and shall take a note of the order made by the court.

Chancery visitors of lunatics.

Turning from the duties of administration to those of supervision, we come finally to the chancery visitors of lunatics. This body must be carefully distinguished from the commissioners of lunacy, with whom it has no connection whatever, save in the similarity of the offices performed by each. But the supervision of the visitors is confined exclusively to the class of lunatics so found by inquisition (*k*); that of the commissioners in lunacy has to do with no lunatic so found by inquisition as such, although fully one-half of the class, as falling under the category of residents in asylums, registered hospitals, or licensed houses, or some other of the categories which introduce the jurisdiction of the commissioners, are also visited by them. The visitors are officers of the lord

Distinguished from commissioners in lunacy.

(*f*) See 16 & 17 Vict. c. 70, s. 10, see also s. 14.

(*g*) For the position and duties of the registrar, see 16 & 17 Vict. c. 70, ss. 10, 11, 14, 92, 99, 100, 101.

(*h*) See Lun. Orders 1883, 7, 8.

(*i*) R. L. 1890.

(*k*) In the L. Act, 1890, and Rules, the visitors referred to in this work are called "Chancery Visitors."

chancellor; the commissioners in lunacy, although appointed by the lord chancellor, exercise a comparatively independent authority (*l*).

Composition of board.

The board of visitors consists of medical and legal visitors, of whom the masters in lunacy for the time being are two (*m*). There are two medical and one legal visitors besides the masters who may be removed by the lord chancellor in case of misconduct or neglect in the discharge of their duties, and they are forbidden during their tenure of office to engage in the practice of their respective professions (*n*). The qualification of a medical visitor is actual practice as a medical practitioner; that of a legal visitor not less than five years' standing as a barrister (*o*). A common disqualification is the possession during the two years next preceding the appointment, or at any time during his tenure of office, of any interest, direct or indirect, in any house licensed for the reception of insane persons (*p*).

Duties.

The visitors are, in respect of the inquiries and investigations which they are to make and the manner in which they are to make them, subject to the rules in lunacy, and in any particular case to the special order of the judge in lunacy (*q*). But in all events every lunatic so found, is to be personally visited and seen by one of the visitors twice at least in every year, and the visits are so regulated that the interval between successive visits to any particular lunatic shall not exceed eight months. Lunatics who are resident in private houses are during the two years next following inquisition to be visited at least four times in every year (*r*).

Previous need of visitation.

The arrangement just alluded to, which was in substance established in 1862, was a vast improvement even on the

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(*l*) For the duties and powers of the Commissioners in lunacy, see the Lunacy Act, 1890 (53 Vict. c. 5), Part V.

(*m*) 53 Vict. c. 5, ss. 163, 166.

(*n*) 53 Vict. c. 5, 164.

(*o*) 53 Vict. c. 5, s. 163.

(*p*) 53 Vict. c. 5, s. 165.

(*q*) 53 Vict. c. 5, s. 183, sub-s. (1).

(*r*) Ib. s. 183, sub-ss. (2) (3).

immediately preceding legislation. Before this there had been no settled system in the visitation of lunatics so found by inquisition, as such; and by the Lunacy Regulation Act, 1853, one visit only in each year was required in any case, the interval between successive visits frequently reaching eighteen or nineteen months. The practice was made the subject of much comment by the commission of the year 1859, the fruit of which appears in the salutary regulations just mentioned. The utility of the visits had, however, been already enhanced by the directions of the General Orders issued in the year 1855, in accordance with which the visitors were furnished by the master with a notice of the allowance made to the committee of the person of each lunatic for the purpose of maintenance, and of the scheme of maintenance approved by him (*s*). Further details on this point will be found at length hereafter (*t*).

Visitation now extended by special direction to persons alleged to be insane.

By the L. R. Act, 1862, the duties of the visitors were extended to the visiting of persons alleged to be insane, and the making inquiries in regard to them in such cases as the lord chancellor in lunacy might direct (*u*). This was a necessary provision, in consequence of the summary jurisdiction exercised by the lord chancellor in lunacy under the two Lunacy Regulation Acts in the case of lunatics whose property was of small value (*x*). These provisions are re-enacted in the Lunacy Act, 1890 (*y*).

Visitors' reports.

The result of the visits is in all cases communicated to the lord chancellor by reports sent in within a convenient time after each visit as to the state of mind and bodily health, the general condition, and the care and treatment of the lunatics visited (*z*). Special reports are also made when such a course seems required, and in particular when

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(*s*) See now, R. L. 1890, 101.

(*t*) Post, p. 109.

(*u*) 25 & 26 Vict. c. 86, s. 21.

(*x*) 16 & 17 Vict. c. 70, s. 120, and 25 & 26 Vict. c. 86, ss. 12—14.

(*y*) 53 Vict. c. 5, s. 184.

(*z*) 53 Vict. c. 5, s. 185, sub-s. (1).

on any visit the visitor has been unable to discover the then residence of, or has been by any other circumstance prevented from actually seeing, the lunatic (*a*). The activity of the visitors is further provided for by the requirement of a series of half-yearly reports, showing the number of visits made, patients seen, and miles travelled by them in the preceding six months (*b*).

These last reports, with a return of the sums received for travelling expenses or upon any other account, are also laid before Parliament (*c*). All other reports made by the visitors are kept in strict secrecy, being closed to the inspection of every one save the members of board of visitors and the judge in lunacy, and such persons as he specially appoints. All the reports relating to any particular patient are destroyed on his death, and are also destroyed on the inquisition in his case being superseded or being vacated and discharged on a traverse, unless the judge in lunacy, within fourteen days after the *supersedeas* or the vacating or discharge on a traverse, specially order that the same be not destroyed until the death (*d*).

The board of visitors.

The visitors, including the masters as *ex-officio* members, form a board for their mutual guidance and direction on matters connected with the visiting of lunatics. Three members form a quorum. The board is at liberty to report to the lord chancellor upon any matter connected with the duties of the visitors or of the board as it thinks proper (*e*). There was formerly a secretary to the visitors appointed by the lord chancellor, and holding office during pleasure; but this office was abolished in 1875 (*f*). The necessary clerks to the visitors are appointed by the lord chancellor, with the concurrence of the Treasury (*g*).

(*a*) 53 Vict. c. 5, s. 185, sub-s. (2).

(*b*) 53 Vict. c. 5, s. 184, sub-s. (1).

(*c*) Ib.

(*d*) 53 Vict. c. 5, s. 186.

(*e*) Ib. s. 167.

(*f*) 16 & 17 Vict. c. 70, s. 22; 38 & 39 Vict. c. 77, s. 31.

(*g*) See 32 & 33 Vict. c. 91, s. 14; 53 Vict. c. 5, s. 163, sub-s. (3).

Such is a short sketch of the character and duties of the principal officers by whose assistance and ministration the trust committed to the judge in lunacy is executed. The machinery is extensive, and, notwithstanding the reforms of modern legislation, still costly. The method in which the funds necessary to meet this cost are at present raised, consists in the combination of two principles, the one being that of a percentage graduated as between the richer and poorer estates, the other the original principle of fees on proceedings.

Expenses of lunacy office, how raised.

The rules as to this, as contained in the L. Act and Rules, 1890, are so explicit, and at the same time so compact, that a reference to them is sufficient (*h*).

Office copies.

The only copies of documents generally made in the office in lunacy are those specified in the Rules in Lunacy, 1890, 138. All other copies are made by the party or solicitor filing or leaving the same, or who may have taken office copies of them; but on the party or solicitor refusing or neglecting for more than two clear days to furnish a copy, the copy may be taken at the office. For further information as to these copies, the reader is referred to the same Rules (*i*).

Power to amalgamate the lunacy departments.

The lord chancellor may at any time after 1st of May, 1890, amalgamate the office of masters in lunacy and their staff, and the office of the lord chancellor's visitors of lunatics and their staff, and may amalgamate such offices or either of them with the office of the commissioners in lunacy. Such amalgamation is not to prejudice the rights of the masters, visitors and commissioners respectively holding office on the 1st of May, 1890. The lord chancellor may also order that the expenses incurred in carrying the amalgamation into effect, including the cost of providing office accommodation, shall be paid out of the

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(*h*) 53 Vict. c. 5, ss. 148, 149; R. L. 1890, 125—137.

(*i*) See the Rules in Lunacy, 138—146, App., post.

percentage charged on the incomes of lunatics under the Lunacy Regulation Act, 1853 (*k*). The lord chancellor may, with the concurrence of the Treasury, also fix the qualifications and salaries of the members of the amalgamated office and staff, and increase or diminish the number of such members (*l*).

(*k*) 53 Vict. c. 5, s. 337. (*l*) Ib.

CHAPTER II.

OF THE COMMISSION OF LUNACY.

SECT. 1.—*Methods of Inquiry into Insanity.*

THE process of asserting the royal prerogative in early times suggested more prominently the material advantage which the crown anticipated from its exercise than the parental care which was to be thrown around the subject. The escheators and sheriffs, whose duty it was to make inquiry concerning any matter which gave the king a title to the possession of lands, tenements, goods or chattels (*a*), were employed equally where that matter was idiocy or lunacy (*b*); though, as in ordinary cases, special commissions were sometimes issued for the same purpose (*c*). By degrees the latter, as possessing more large and general powers, became universally adopted, and with various changes in the constitution of the commissioners continued in use until 1853 (*d*).

Escheator and sheriffs.

Commissioners.

As in other cases affected by the royal prerogative, the verdict on the inquisition must have been found on the oaths of twelve good people and lawful (*e*). As in other

Incidents of the inquisition.

(*a*) The statutes relating to these officers will be found collected in Rastall, tit. "Escheators." *Ex parte Southcot*, Ambl. 111; where an attempt was made to distinguish between the respective provinces of escheators and sheriffs in relation to this subject; but see *Ex parte Cranmer*, 12 Ves. 450, n. (11); West's Symb. ss. 368—370; Viu. Abr. tit. Lun. E 2.

(*b*) See 2 Wils. & S. 517, per Eldon, C.

(*c*) *Ex parte Southcot*, Ambl. 111.

(*d*) See in particular, Ibid.; Shelf. Lun., p. 92; 3 & 4 Will. 4, c. 36, s. 1; 5 & 6 Vict. c. 84, ss. 1, 2, 5; 16 & 17 Vict. c. 70, ss. 6 *seq.*

(*e*) 34 Edw. 3, c. 13; and cf. 2 Inst. 206; 3 Edw. 1, c. 24; 1 Hen. 8, c. 8.

cases the proceedings were commenced by writ issued on petition to the lord chancellor and returnable into chancery (*f*), and, as in other cases, the subject against whom office was found, had, besides other remedies, his right of traversing the inquisition (*g*).

Modern practice.

According to the present practice the question whether a particular person is proper to be brought under the care of the Court of Lunacy, is determined either by a commission (*h*) or by an issue directed to the High Court of Justice (*i*). The latter alternative is seldom adopted, and its consideration may for the present be conveniently postponed (*k*).

The commission.

The general commission.

Commissions (*l*) are of two kinds, general and special. The general commission is issued in duplicate under the great seal, directed to the masters by name, jointly and severally; and the masters, by virtue of this general commission, proceed in each case of alleged lunacy, concerning which the judge in lunacy may order them to inquire (*m*).

Special commission.

A special commission is issued by the lord chancellor to any person or persons alone or in addition to the masters, or one of them (*n*).

The general commision applied by order to the particular case is that almost invariably employed, recourse being had to the special commission only where for exceptional reasons

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(*f*) 29 Edw. 1; 36 Edw. 3, c. 13; 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; 18 Hen. 6, c. 7; 1 Hen. 8, c. 8; 1 Hen. 8, c. 10, s. 3; cf. 5 Rep. 52 a; 12 East, 111.

(*g*) See the following statutes providing for publicity of proceedings, &c.:—34 Edw. 3, c. 13; 36 Edw. 3, c. 13; 8 Hen. 6, c. 16; 23 Hen. 6, c. 17; 12 Edw. 4, c. 9; 1 Hen. 8, c. 8; for behaviour of crown officers, 3 Edw. 1, c. 24; 36 Edw. 3, c. 13; 8 Hen. 6, c 16; 18 Hen. 6, c. 17; 1 Hen. 8, c. 8; for protection of subjects' interest meanwhile, 36 Edw. 3, c. 13; 8 Hen. 6, c. 16; for recovery of property, 29 Edw. 1; 36 Edw. 3, c. 13; for traverse, post, p. 76.

(*h*) 53 Vict. c. 5, ss. 112, 113.

(*i*) 53 Vict. c. 5, s. 94; *In re Scott*, 27 Ch. D. 116.

(*k*) Vide post, p. 49.

(*l*) For the meaning of the word "Commission," see 53 Vict. c. 5, s. 334.

(*m*) 53 Vict. c. 5, ss. 112, 334; and cf. 4 Inst. 80, 81.

(*n*) 53 Vict. c. 5, s. 113.

the lord chancellor may deem it proper to issue it in preference (*o*).

Commissions without a jury.

The general commission extends to inquisitions as well without as with a jury. This was a further alteration introduced by the L. R. Act, 1853. Down to the passing of that act the direction was given to the persons addressed in each commission, as it was given in the old writs to the escheator or sheriff, to inquire by the oath of good and lawful men of the county, as well within liberties as without, by whom the truth of the matter might be better known. Under the present practice the inquiry is made by the masters or one of them without a jury (*p*), except in the following cases:—

Cases in which the inquiry must be before a jury.

Lunatic out of jurisdiction.

1. When the alleged lunatic is not within the jurisdiction (*q*). This is only a recurrence to the old practice where the new is inadmissible. The lunatic might wish to demand a jury, when properly he would have to be examined by the judge in lunacy (see 2).

Lunatic demanding a jury.

2. When the alleged lunatic has within the appointed period demanded an inquiry before a jury, and the judge in lunacy being satisfied by personal examination that he is competent to form and express a wish, directs the return of a jury in the order for inquisition (*r*).

Demand, how made.

The demand is made by a notice signed by the alleged lunatic, attested by his solicitor, and filed with the masters at any time before the consideration of the petition or report or by himself, his counsel or solicitor upon such consideration (*s*).

Examination by the judge in lunacy.

On the demand being made, the judge in lunacy must examine the alleged lunatic personally, and unless he is satisfied thereby that he is mentally incompetent to form

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(*o*) This would only be issued in case of both the masters being personally interested, or for some similar reason. Cf. *Re Braithwaite*, 1823, June 26.

(*p*) 53 Vict. c. 5, s. 92.

(*q*) Ib. s. 96; cf. *Ex parte Southcot*, 2 Ves. sen. 401. See statement of the practice by Cotton, L. J., in *In re Lees*, 26 Ch. D. p. 500; *Re Scott*, 22 W. R. 748.

(*r*) 53 Vict. c. 5, ss. 90, sub-s. (2), 91; *In re Talbot*, 20 Ch. D. 269.

(*s*) R. L. 1890, 26.

and express a wish for an inquiry by a jury, he must direct the return of a jury in his order for the inquiry (*t*).

Waiver of right to jury.

After demand the alleged lunatic may still waive his right, and that whether the demand was made previously to or at the hearing of the application (*u*). Sect. 90, subs. (3), of the L. Act, 1890, seems indeed to provide for the former case only; but in *Re Crompe* (*x*), where the demand had been made at the hearing, the court on the application of the petitioner, the alleged lunatic appearing and consenting, amended the order for inquiry, which had directed the return of a jury, by making it in the common form. The right to demand a jury is confined to the original inquiry (*y*).

Observations on the above practice.

To the criticism that the previous examination by the judge in lunacy is a prejudgment of the question at issue, it may be replied, (a.) that it does not prejudice the question; (b.) that the judge in lunacy will only refuse a jury where the lunacy is plain; (c.) that it is rather to ascertain that the demand is *bonâ fide*, and to save the alleged lunatic useless exposure and expense; (d.) that the judge in lunacy may, notwithstanding he is morally satisfied of the incompetence himself, yet in his discretion direct an inquiry by jury. Lord St. Leonards' judgment in *Re Cumming* (*z*), where a similar question was raised as to the examination prior to a traverse, may be consulted on this point.

On master's suggestion.

3. The inquiry will be by jury where the master, acting under the commission, upon consideration of the evidence before him, certifies that in his opinion an inquiry before a jury is expedient (*a*).

This case is more exposed than the last to the criticism of involving two trials, but though the inconvenience of a

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(*t*) 53 Vict. c. 5, s. 91. In practice the judge in lunacy frequently causes the alleged lunatic to be previously examined by a medical man appointed by the court.

(*u*) 53 Vict. c. 5, s. 90.

(*x*) L. R., 4 Ch. 653.

(*y*) *In re Talbot*, 20 Ch. D. 269.

(*z*) 1 De G., M. & G. 551.

(*a*) 53 Vict. c. 5, s. 93.

strict compliance with it was pointed out by Mr. Barlow to the lunacy commission in 1859, no alteration has been made.

4. In any other case in which the judge in lunacy in his order so directs (*b*). By direction of the judge in lunacy.

According to the alternative course provided by the L. Act, 1890, the judge in lunacy, when ordering an inquiry before a jury, may direct an issue to be tried in the High Court; the question being the same as on an inquiry before the master. The verdict on the issue has the same force as an inquisition under a commission of lunacy finding a similar verdict (*c*). Issue in the high court with a jury.

This course, which is applicable only in substitution for cases 1, 2 and 4 above—the masters in 3 issuing their precept to the sheriff without further order—is rarely followed.

The issue can be directed by an order in lunacy which is sufficient to give jurisdiction to the judge trying the issue (*d*).

Sect. 2.—*Of the Issue directed by the Commission or Order for Inquiry.*

The issues directed by the old writs and commissions in the nature of writs went not merely to the kind of insanity, but also to the time of its commencement, and a variety of other matters relating to the alleged lunatic, which now form the subject of inquiry by the master immediately after inquisition found (*e*). Old practice.

By the L. Act, 1890, the inquisition is confined to the question whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs, and no evidence as to anything done or said by him, or as to his demeanour or Modern practice. As to the evidence.

(*b*) Ib. s. 92.
(*c*) 53 Vict. c. 5, ss. 94, 334.
(*d*) *In re Scott*, 27 Ch. D. 116.
(*e*) F. N. B. 232; *Ex parte Cranmer*, 12 Ves. 449; *Ex parte Smith*, 1 Swanst. 6.

state of mind at any time being more than two years before the time of the inquisition, shall be receivable in proof of insanity, unless the person executing the inquisition otherwise directs (*f*). The discretion which formerly existed (*g*) of directing an inquiry from what time the alleged lunatic has been of unsound mind is taken away by this section (*h*).

Sect. 3.—*Of the Circumstances under which a Commission or Inquiry will be granted.*

Difficulties of the old practice.

The books exhibit grave searchings of heart on the part of the chancellors as to the precise form of insanity to be *primâ facie* established in order that a commission might issue. Originally it must have been idiocy or lunacy (*i*); then the state of *non compos mentis*, or unsound mind, was admitted (*k*), and Lord Eldon pushed the matter to its fullest extent. In fact, so solicitous was this great judge for the protection of the insane, that when unwarranted in issuing the commission he was disposed to avail himself of a kind of modified imitation of civil law interdiction, a tendency in which he has not been followed by his successors (*l*).

Eldon, C.

Modern requirements. Probability of a finding.

Practically the court requires to be satisfied that if an inquiry is directed it will probably result in a verdict in the form of the issue, viz., that the alleged lunatic is of unsound mind, and incapable of managing himself or his

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(*f*) 53 Vict. c. 5, s. 98, sub-s. (1).

(*g*) 16 & 17 Vict. c. 70, s. 47.

(*h*) *In re Danby*, 30 Ch. D. 320; dissenting from *Re Sottomaior*, 9 Ch. 677 on this point.

(*i*) *Re Portsmouth*, cit. ap. Shelf. Lun., p. 104, per Eldon, C.; *Ex parte Barnsley*, 3 Atk. 171; *Ridgeway* v. *Darwin*, 8 Ves. 65.

(*k*) *Lord Donegal's case*, 2 Ves. sen. 408; *Sherwood* v. *Sanderson*, 19 Ves. 286; see also in argument, *Ex parte Cranmer*, 12 Ves. 447; *Re Monahan*, 9 Ir. Eq. Rep. 253; Com. Dig. Id. B.

(*l*) *Re Langley*, cit. ap. Shelf. Lun., p. 109; *Ridgeway* v. *Darwin*, 8 Ves. 65; *Sherwood* v. *Sanderson*, 19 Ves. 286; *Re B*, 3 Ir. Jur. 98; but see *Ex parte Barnsley*, 3 Atk. 173; *Gibson* v. *Jeyes*, 6 Ves. 273; *Re J. B.*, 1 My. & Cr. 538; and see *Re Lawler*, Ir. Rep., 8 Eq. 506.

affairs (*m*). For this purpose it not uncommonly causes the party to be previously examined by one or more medical men nominated by itself (*n*), and, but more rarely, has a personal interview with the alleged lunatic (*o*).

But this is not all. The court should also be satisfied that the inquiry is really necessary or expedient for the benefit of the lunatic with reference to his health and the well-being of himself and his property (*p*). Probability of benefit to the lunatic.

SECT. 4.—*Of the Persons against whom a Commission may issue or an Inquiry be directed.*

1st. A commission may issue or an inquiry be directed against any subject of the crown, who has attained his full age and is resident, and possessed of property, in this country. The form of this statement suggests other classes which may be discussed particularly. Adult subjects resident and possessed of property in this country.

2nd. Minors. During infancy there is not the same necessity as in adult age that a lunatic should be subjected to an inquisition. A minor is either under the guardianship of his father, or if he be dead, in many cases under that of a testamentary guardian. Moreover, the protection extended by the Chancery Division of the High Court to infants is not ousted by lunacy (*q*). Minors.

Nevertheless minority is no impediment to an inquisition, which will be granted under special circumstances (*r*), as, *e.g.*, where the more ample powers of the court of lunacy are required for the management of the lunatic's estate.

(*m*) *Sherwood* v. *Sanderson*, 19 Ves. 286.

(*n*) *Ex parte Tomlinson*, 1 V. & B. 59 ; *Ex parte Persse*, 1 Moll. 219.

(*o*) *Re Windham*, 31 L. J., N. S., Ch. 720.

(*p*) *Ex parte Tomlinson*, and *Ex parte Broadhurst*, 1 V. & B. 57 ; *Re J. B.*, 1 My. & Cr. 538 ; *Re Hoblyn*, 29 L. T. 305.

(*q*) Shelf. Lun., p. 110 ; *Beall* v. *Smith*, L. R., 9 Ch. 85 ; *In re Edwards*, 10 Ch. D. 605.

(*r*) *Halse's case*, cit. ap. 2 Ves. sen. 403 ; *Re Flint*, cit. ap. Shelf. Lun., p. 110; but see interlocutory observation of James, L.J., in *In re Edwards*, *ubi sup.*

Non-resident proprietors.

3rd. Subjects possessing property in this country but not resident here. That this class might be made subject to a commission was decided by Hardwicke, C., in *Ex parte Southcot* (*s*), which has been frequently followed (*t*). The practice, as we have seen, is recognized by the legislature (*u*). The alleged lunatic need not be brought from abroad to be present at the inquisition, nor need he be served with a copy of the petition as in other cases (*x*).

Residents not possessing property within the jurisdiction.

4th. Subjects resident in this country, but not possessing property here, may also be made lunatic by inquisition. It is in this country that they are maintained, and that all their dealings, so far as they are personal to themselves, take place; while in the present day, at least, the jurisdiction attaches no less to the person than to the estate (*y*). With regard to any property abroad the powers of the court will be exercised in submission to the *lex loci sitûs* (*z*).

Subjects resident in this country, but possessing no property at all, are indeed liable to be made lunatics by inquisition, but in the face of the enlarged protection furnished them in other ways, there is no reason why they should be (*a*).

Aliens.

5th. Aliens. *Re Princess Bariatinski* (*b*) decided that aliens resident and possessed of property here are liable to a commission, and the arguments of Lyndhurst, C., in that case apply equally to the case of an alien possessing property here but resident abroad, as to which there is no decision in any reported case. The common contingency

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(*s*) 2 Ves. sen. 401.

(*t*) *Re Webb*, 2 Coop. T. L. C. 145; *Re Stevens*, *Re Lyon*, cit. ib., p. 150; *Re Scott*, 22 W. R. 748; and see the earlier cases, *Re Hodsell*, cit. Ambl. 110; *Re Halse*, 2 Ves. sen. 403.

(*u*) 53 Vict. c. 5, s. 96, and see 16 & 17 Vict. c. 70, s. 45.

(*x*) *Re Braithwaite*, *Re Southcot*, 2 Coop. T. L. C. 164; *In re Lanwarne*, 30 W. R. 759.

(*y*) Cf. *Re Houstoun*, 1 Russ. 312; *Re Tottenham*, 2 My. & Cr. 39; *Ex parte Annandale*, 1 Ambl. 80; and cases cit. ibid; *In re Barlow's will*, 36 Ch. D. 287.

(*z*) Cf. *Newton* v. *Manning*, Mac. & G. 362; *In re Barlow's will*, 36 Ch. D. 287.

(*a*) See the sections relating to pauper lunatics in 53 Vict. c. 5.

(*b*) 1 Phill. 375.

of an alien resident but not possessing property here is also not to be found; but a colonist possessing no property in England was made a lunatic during a temporary residence (*c*).

6th. In the case of a person, whether a subject or an alien, neither resident nor possessing property in this country, the question is not likely to arise.

Foreign courts.

It may be convenient here to observe that, with the exception of Ireland (the practice as to which has been already pointed out (*d*)), the English court of lunacy is not obliged to take notice of the proceedings in other courts of lunacy save for purposes specifically prescribed by statute (*e*).

At the same time where an alien who has been duly found lunatic in his own country has also been found lunatic here, the court will, in a proper case, direct him to be given into the care of the person appointed for the purpose by the foreign court, and will, so far as the practice of the court and justice allow, comply with any request which the foreign court may make with a view to the more complete exercise of its jurisdiction (*f*). And it is now enacted that an alien who is detained as a lunatic may in a proper case be removed to the country of which he is a subject. A warrant for the purpose must be obtained from a Secretary of State (*g*).

Appeals.

As to appeals, see ante, p. 32.

(*c*) *Re Houstoun*, 1 Russ. 312.

(*d*) Ante, p. 31.

(*e*) *E. g.*, 53 Vict. c. 5, s. 149, and see Bk. II. Pt. i. c. 2, sub fin. and *In re Barlow's Will*, 36 Ch. D. 287 ; 53 Vict. c. 5, s. 131.

(*f*) *Re Sottomaior*, L. R. 9 Ch. 677.

(*g*) 53 Vict. c. 5, s. 71.

CHAPTER III.

OF THE MANNER OF OBTAINING THE COMMISSION.

SECT. 1.—*The Petition for an Inquiry.*

Commission usually obtained by petition,

THE Commission, including always the order for inquiry under the general commission, is usually obtained on petition presented to the lord chancellor (*a*).

which should be presented by near relatives.

The petition is most commonly preferred by private individuals standing in a near relation to the alleged lunatic (*b*); and, although under exceptional circumstances, strangers (*c*) or the attorney-general (*d*) may present them with success, yet when the petition is not by the nearest relations the court looks upon it with particular jealousy, for it implies that the persons who ought to protect the lunatic are neglecting their duty (*e*).

Conditions required when not presented by nearest relatives.

The practice of the court has given support to this principle by requiring the fulfilment of certain definite conditions precedent to the issuing of the commission in cases where the rule is departed from, and by determining who, in particular cases, are *primâ facie* the proper persons to move the court in the matter.

Thus, a husband should present the petition for a commission against his wife, and *vice versâ* a wife against her husband. Where the application is made by any other person, it must be shown that the husband or wife, as the case may be, either assents to the proceedings, or is at least acquainted with them. Where the assent of the husband

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(*a*) R. L. 1890, 12, Sch. Form 1 as to inquiry on report of the Commissioners in Lunacy, vide infra, p. 57.

(*b*) *Re Bedell*, 2 Coop. T. L. C. 163.

(*c*) *Re Anstie*, 1 Mac. & G. 200.

(*d*) 1 Coll. Lun. 125.

(*e*) *Ex parte Persse*, 1 Moll. 219.

or wife in writing under his or her hand is not previously obtained, the petition will not it seems be granted on the affidavits only (*f*).

Similarly, where the alleged lunatic is unmarried, the next of kin or some of them should present the petition; otherwise it must be shown that they either assent to or are acquainted with the application, and except in the former case the petition may be adjourned into court (*g*).

On whose application, besides that of husband, wife, or next of kin, commissions have issued.

Of persons other than the husband, wife or next of kin of the alleged lunatic, commissions have been issued on the petition of the following:—An executor under a will against a legatee under the same will (*h*); a trustee under a deed or will against his *cestui que trust* (*i*); a creditor against his debtor (*k*); a tenant against his landlord (*l*); the solicitor to the treasury against a person confined in prison (*m*); and where the proper persons to make the application neglect their manifest duty in this respect, even an absolute stranger (*n*).

Commissions issued on the report of the commissioners in lunacy.

Nor, indeed, is this all. Under the L. Act, 1890, s. 100, where the commissioners in lunacy report to the lord chancellor that they are of opinion that the property of any person detained or taken charge of as a lunatic but not so found by inquisition is not duly protected, or that the income thereof is not duly applied for his benefit, the report shall be filed with the masters. Where they so report the report is filed in the masters' office, and taken to be tantamount to an ordinary application for inquisition supported by evidence in the manner presently described. It is further provided that the alleged lunatic shall, in this case, have notice of the report from such person, as the judge in lunacy directs; and the case proceeds and is con-

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(*f*) Elmer, p. 7; *Re Turner*, 2 Coop. T. L. C. 163; *Re Rean*, ib.

(*g*) Ib.; R. L. 1890, 19.

(*h*) 1 Coll. Lun. 126; Shelf. Lun. 114.

(*i*) Ib.

(*k*) *Re Pearce, Ex parte Clarke*, 8 Jur. 89; *Re Bell*, 2 C. P. Cooper, T. L. C. 163.

(*l*) *Ex parte Ogle*, 15 Ves. 112.

(*m*) *Re M'Lean*, 1806, Jan. 23.

(*n*) *Re Smith*, 1 Russ. 348; *Re Anstie*, 1 Mac. & Gor. 200; *Re E. S.*, 4 Ch. D. 301.

ducted as nearly in all respects as may be as on the ordinary presentation of an application for an inquisition (*o*). The form of the notice is given in the schedule to the R. L. 1890, Form 3.

Main point—Is the commission for the good of the alleged lunatic.

In all cases and whosoever may be the person by whom the necessity for a commission is suggested to the court, it must be shown that the commission will enure for the benefit of the alleged lunatic (*p*). Where this is the case the particular motives which have or are stated to have influenced the petitioner in making the application will not affect the decision of the court (*q*). Where, on the other hand, this is not shown, and it further appears that the petitioner has merely aimed at his own advantage in taking the proceedings, the petition will be refused, and the petitioner will in addition be saddled with all the costs (*r*).

Procedure in presenting petition.

Affidavits in support.

The petition must be signed by the petitioner, and attested by a solicitor (*s*). The petition is supported by affidavits (*t*), which are generally those of two medical men (*u*), and of members of the family, and other persons to whom the alleged lunatic is known, setting forth the particulars of the alleged unsoundness of mind, and the con-

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(*o*) For the curious inquisition against persons frightening Geo. III., see 39 & 40 Geo. 3, c. 94, s. 4.

(*p*) *Ex parte Tomlinson* and *Ex parte Broadhurst*, 1 Ves. & Bea. 57; *Re J. B.*, 1 My. & Cr. 538; *Re Clare*, 3 Jon. & Lat. 571.

(*q*) *Ex parte Ogle*, 15 Ves. 112.

(*r*) *Re Clare*, 3 Jon. & Lat. 571.

(*s*) R. L. 1890, 12.

(*t*) A commission to obtain evidence of witnesses abroad may be obtained on summons, supported by proof of its necessity. *Re Webb*, *Re Woodcock*, 2 Coop. T. L. C. 145. For form of order appointing the commission, see ib. p. 158. In one case where the applicant, the mother of the alleged lunatic, put in her affidavit in support of the application, and set forth therein letters from a medical man in Australia, where the alleged lunatic was residing, and from a friend there stating the lunacy, and also a letter from the alleged lunatic which bore evident traces of lunacy, and the handwriting of which was sworn to in the affidavit, an order for an inquiry with a Middlesex jury was made, the court accepting in evidence the letter verified by the affidavit. *Re Scott*, 22 W. R. 748.

(*u*) Affidavits by medical men not connected with lunatic asylums would seem to be preferable. *Anon.*, Drur. 286.

duct and conversation by which it is shown (*x*). These affidavits also state in general terms the nature and amount of the alleged lunatic's property, and give information as to his nearest relatives (*y*).

The affidavits must be sworn before some duly-authorized commissioner or officer of the Supreme Court other than the petitioner's solicitor (*z*), and, together with the petition, filed in the masters' office (*a*) who prepare office copies of them, for the parties. A plain copy of the petition should be left at the masters' office at the same time, and there will then be marked upon the original petition the date of its presentation, and it will be returned to the solicitor to be served by him upon the alleged lunatic, with the notice required by the Rules in Lunacy endorsed thereupon (*b*).

Alleged lunatic in the jurisdiction.

Where the alleged lunatic is within the jurisdiction he is entitled to notice of the presentation of the petition in the form directed by Rule 22 of the R. L. 1890 (*c*), that he may elect to be tried with or without a jury; no notice is required where the alleged lunatic is out of the jurisdiction, the inquiry in his case being in every case before a jury (*d*).

Out of the jurisdiction.

Petition not set down for hearing.

The petition is not set down for hearing at all. That the order may be made, however, as of course, there must be no opposition to the petition; the judge in lunacy must

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(*x*) *Ex parte Persse*, 1 Moll. 219.

(*y*) Elmer, p. 6, and App., post.

(*z*) *Re Hogan*, 3 Atk. 813; cf. *Hopkin* v. *Hopkin*, 22 L. J., N. S., Ch. 728.

(*a*) R. L. 1890, 14.

(*b*) Elmer, p. 7, and v. inf. The indorsed notice must be signed, by the petitioner himself, or by his solicitor, and not on behalf of his solicitor, R. L. 1890, 22.

(*c*) App., post; and as to service of the notice and affidavit of service, see R. L. 1890, 25.

(*d*) 53 Vict. c. 5, s. 96. Under the old practice it was unnecessary to serve the lunatic in any case with notice of the petition for, or even of the execution of, the commission; though an order might be obtained that reasonable notice be given (*R.* v. *Daly*, 1 Ves. sen. 269), and the masters used to recommend such a notice. In many cases, what Lord Hardwicke called "the laying hold of his lands" was the first notice received by the alleged lunatic (*Lady Marr's case*, cit. Amb. 82): see also per Eldon, C., in *Re Braithwaite*, 2 Coop. T. L. C. 164.

be satisfied with the evidence and with the propriety of the inquiry (*e*); he must also be satisfied that the notice to the alleged lunatic has been given and the time to demand a jury has expired. Finally, the affidavit of service on the lunatic must have been filed in the masters' office. Where all these conditions are fulfilled and it is also satisfactorily shown that the persons who would be the proper parties to present the petition, if they do not present it, yet consent or do not object to it, an order of course issues directing the inquiry to be made (*f*).

When order of course not made on petition.

If, however, the person against whom the commission is sought is within the jurisdiction, or if, being out of the jurisdiction, he or anyone on his behalf has entered a *caveat* against its issuing, and received notice of the application accordingly, he may attend and oppose it in the first instance (*g*), and then an order of course will not be made. So, again, if the petition is by a stranger without the concurrence of the husband or wife, if any, or, where the alleged lunatic is unmarried, of the next of kin, or by a relation without the concurrence of the husband and wife, if any, an order of course will not be made (*h*).

Service of the petition in certain cases.

The petition, when presented by a relation other than the husband or wife, must be served upon the husband or wife (if any), and if presented by a stranger must be served upon the husband or wife (if any), and upon the nearest relations, unless they respectively concur (*i*). Where there are no next of kin, it is nevertheless unnecessary either to serve the attorney-general on behalf of the crown or to obtain his assent (*k*).

(*e*) Ante, pp. 52, 53, 58; *Re Scott*, 22 W. R. 748.

(*f*) Elmer, pp. 6—9; R. L. 1890, 25.

(*g*) 53 Vict. c. 5, s. 90; and for the *caveat* see *Re Galpine*, 1 Coll. Lun. 197; *Re Bushnell*, 2 Coop. T. L. C. 163. For the form of notice to be served on the alleged lunatic, vide App. post.

(*h*) Cf. *Re Turner*, 2 Coop. T. L. C. 162; R. L. 1890, 19.

(*i*) Similar service would presumably be required in proceedings on report of the Commissioners in Lunacy under 53 Vict. c. 5, s. 100.

(*k*) *Re Early*, 1 Jur. 524; *Ex parte Watson*, Jac. 161.

When more than one petition has been presented in the same matter, the order in which they are answered determines the order in which they will be heard; and as between petitions answered on the same day, that which is first presented is entitled to preaudience (*l*). Right to preaudience.

On the mere presentation of a petition, and before the question of lunacy has been determined, an order may, in a proper case, be made for the protection of the property or person of the alleged lunatic. The order should provide for furnishing to those who act on behalf of the alleged lunatic proper means of meeting the inquiry (*m*). Interim order for protection.

Sect. 2.—*Of the Carriage of the Commission.*

The following rules regulate the grant of this privilege where the claim to it is contested. Rules as to carriage of commission.

1. That party will be selected who is most likely to bring out the whole truth (*n*).
2. Subject to (1), a preference is given to the nearest relatives unless there be a specific ground of objection (*o*).
3. In the absence of other determining circumstances, and particularly as between very near relatives, the conduct of the proceedings will be given to the person or persons presenting the earlier petition (*p*).

(*l*) *Re Mallorie*, 1 H. & T. 435; *Re Brookman*, 1 H. & T. 435; see also *Re Wood*, 29 L. J. Ch. 54; *Re Bariatinski*, 13 L. J., N. S., Ch. 386.

(*m*) *Re Heli*, 3 Atk. 635; *Re Holmes*, 4 Russ. 186; *Re Naylor*, 1 N. R. 173; *Re King*, cit. ap. Shelf. Lun. p. 159; *Re Galloway*, ib.; *Re Turner*, ib.; *Re Chapman*, alias *Dunn*, ib., p. 161; and cf. *Re Baker*, ib., pp. 159, 160; *In Re Bullock*, 35 W. R. 109.

(*n*) *Re Green*, 2 Coop. T. L. C. 163; *Re Whittaker*, 4 Myl. & C. 441; *Re Webb*, 2 Phill. 10; *Re Nesbitt*, 2 Phill. 245.

(*o*) *Ex parte Tomlinson*, 1 V. & B. 59; *Re Bedell*, 2 Coop. T. L. C. 163; *Re Anstie*, 1 Mac. & G. 200.

(*p*) *Re Wood*, 1 De G., F. & J. 142; *Re Bariatinski*, 1 Phill. 379.

Appointment of committee does not necessarily follow grant of carriage.

The question who shall have the carriage of the commission is not the same as, nor is it immediately connected with, the question as to who shall be the committee or committees of the lunatic. There is no rule giving a preference in the appointment of a committee to the party who has the carriage of the commission. Lord Cottenham said in one case that it would be a very improper rule, if any such existed (*q*).

Sect. 3.—*Of Permission to attend the Execution of the Commission.*

Who may be present at the execution of the commission.

The order made on the hearing of the petition usually includes a declaration as to what persons, if any, other than those entrusted with the carriage of the commission, shall be allowed to be present at its execution either at their own cost or otherwise. The following principles generally apply:—

1. None but the alleged lunatic or persons acting on his behalf can take part in the inquiry without the special leave of the judge in lunacy (*r*). Historically the inquisition is an *ex parte* proceeding; and the trace of its original character is so far preserved that the ordinary ground on which leave is given for third parties to attend, is that their attendance will be for the benefit of the alleged lunatic and the elucidation of the matter at issue (*s*).

At the same time the grant of permission to attend is purely in the discretion of the court (*t*), which is at liberty to make such conditions as seem fit with regard to the costs occasioned by such attendance (*u*).

2. The attendance of persons interested will be allowed

(*q*) *Re Webb*, 2 Phill. 10.

(*r*) *Re Clements*, 2 Coop. T. L. C. 166.

(*s*) *R.* v. *Daly*, 1 Ves. sen. 269; cf. Shelf. Lun. p. 131.

(*t*) *Ex parte Snook*, 1 Phill. 512; *Re Webb*, 2 Phill. 10; *Re Wood*, 1 De G., F. & J. 142;

(*u*) *Re Parkinson*, 5 Jur. 547; *Re Richards*, 1 De G., M. & G. 719.

where they are likely to aid in bringing out the truth (*x*). It is for the interest of all parties, said Lord Cottenham in one case, that the truth should be ascertained, and, therefore, though it occasions some additional expense, unless the estate is a very poor one, it is desirable that such parties should have leave to attend (*y*).

Who may be present at the execution of the commission.

3. Where it is not quite clear that the presence of certain parties, who are at the same time much interested in the verdict, will be for the benefit of the lunatic and the establishment of the truth, liberty is nevertheless sometimes given to them to attend the execution of the commission, on condition that their costs shall not be allowed them if it should appear, upon the return of the commission, that there was no good ground for the application (*z*).

4. Persons are not allowed to attend on the ground of mere relationship unless they have an interest, or show *primâ facie* ground for an inference that their presence will materially assist in bringing out the truth (*a*).

5. With regard to strangers interested in the verdict, the old rule seems to have been that they should not be allowed to attend when their object in attending was not to prove the sanity of the party, but with a view simply to the protection of their own interest (*b*). It appears, however, that they would now be allowed to attend at their own costs, at least where there are no next of kin (*c*).

6. When liberty to attend is given, it will not be saddled by any condition that the party shall be bound by the verdict of the inquisition (*d*).

Another order, occasionally made in proper cases at the same time, is one directing that the petitioner, whether for

Access to the lunatic.

(*x*) *Re Nesbitt*, 2 Phill. 245; cf. *Re Green*, 2 Coop. T. L. C. 163.

(*y*) *Re Nesbitt* 2 Phill. 247.

(*z*) *Re Parkinson*, 5 Jur. 547; *Re Richards*, 1 De G., M. & G. 719.

(*a*) *Re Nesbitt*, 2 Phill. 245.

(*b*) *Ex parte Snook*, 1 Phill. 512.

(*c*) *Re Webb*, 2 Phill. 10; *Re Richards*, 1 De G., M. & G. 719. And see *Re Scarlett*, 8 Ch. 739.

(*d*) *Re Nesbitt*, 2 Phill. 245, overruling *Ex parte Newbury*, cit. 1 Phill. 513; *Ex parte Snook*, ib. 512.

the commission or for leave to attend and oppose it, shall personally, or by medical men or other persons, have access to the alleged lunatic for the purpose of making such an examination as may enable him or them to give evidence as to the state of the alleged lunatic's mind (*e*). Where disputes arise as to the terms on which the access of medical witnesses should be allowed, the court will order that two of the visitors see the alleged lunatic and report (*f*). And if from the residence of the alleged lunatic out of the jurisdiction it is important to procure the evidence of witnesses abroad, a commission to obtain such evidence will be granted on an application to the court for the purpose duly supported by proof of the necessity (*g*).

Commission to take evidence abroad.

Notice of inquiry.

The order for an inquiry usually contains a direction that notice of its execution shall be given to the persons opposing it, if any (*h*).

Effect of alleged lunatic's death.

The death of the alleged lunatic effectually prevents the inquiry being proceeded with (*i*).

Sect. 4.—*Of the liability of Persons suing out a Commission.*

Costs.

Irrespective of a primary liability for costs—a point to be considered hereafter (*k*)—the petitioner is liable to an action by the alleged lunatic. To support such an action, malice or a want of probable cause must be proved. If malice is relied on, then some slight evidence of a want of probable cause must also be given; on the other hand, upon proof of a want of probable cause, malice may be implied (*l*).

Action by alleged lunatic.

(*e*) *Re Fletcher*, cit. ap. Shelf. Lun. p. 126; *Re Bariatinski*, 1 Phill. 379.

(*f*) *In re Anon., an alleged lunatic*, 18 Ch. D. 26.

(*g*) *Re Webb, Re Woodcock*, 2 Coop. T. L. C. 145, 158.

(*h*) *Ex parte Hall*, 7 Ves. 261.

(*i*) 4 Rep. 127 a.

(*k*) Post, Bk. I. Pt. i. c. 20; and *Re Windham*, 31 L. J., N. S., Ch. 720.

(*l*) *Turner* v. *Turner*, 1 Gow, N. P. 20.

It seems, however, that an action of this kind cannot be sustained unless it be shown that the commission, if actually issued, has been superseded, or that the party has been found on the inquisition to be of sound mind (*m*).

Agreement to sue out commission not illegal.

An agreement to sue out a commission of lunacy is not void or illegal for champerty or maintenance, nor as against public policy, nor as a fraud on the jurisdiction in lunacy (*n*).

No compromise of commission sustainable.

A commission cannot be compromised so as to make the agreement binding on the alleged lunatic, the petitioner being estopped from denying the alleged lunatic's incompetency to give a valid consent (*o*).

(*m*) *Whitworth* v. *Hall*, 2 Barn. & Ad. 695; *Matthews* v. *Dickinson*, 7 Taunt. 399; *Kemy* v. *King*, Carr. & M. 396; *Atkinson* v. *Ralcigh*, 3 Q. B. 79.

(*n*) *Persse* v. *Persse*, 7 Cl. & F. 279.

(*o*) *Cummings* v. *Ince*, 11 Q. B. 112.

CHAPTER IV.

THE EXECUTION OF THE COMMISSION.

SECT. 1.—*Procedure prior to the Inquiry.*

Procedure.

ON the order for inquiry being made as before described, the masters prepare and deliver it to the solicitor having the carriage of the commission. The order is engrossed on parchment, carrying a 2*l.* stamp, and signed by the judge in lunacy (*a*). On obtaining the order the solicitor should at once take it, with the office copies of the affidavits on which it issued, to the office of the masters in lunacy. Under the old practice it was held that a person keeping a commission of lunacy by him for several years, without ever putting it into execution, was guilty of a contempt of court, and the commission as well as a petition under it was discharged with costs (*b*). So now, an alleged lunatic is entitled of right to have an inquiry, which has been ordered, prosecuted at once or discharged (*c*).

Preliminary duties of the solicitor to the petitioners.

The solicitor should be able from previous inquiry to inform the masters on bringing the order before them,—if, that is, the inquiry is directed to be holden before the masters,—what is considered the most convenient place for holding the inquiry (*d*). This may be at the then present residence of the alleged lunatic, provided that, if there be a jury, there is a room large enough to accommodate it, and provided in any case that there is room for witnesses. Or it may be at some neighbouring court or

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(*a*) Elmer, p. 12. When the estate is exempted from fees, the fact is expressly stated in the order.

(*b*) *Anon.*, 2 Atk. 52.

(*c*) *Re Naylor*, 1 N. R. 173.

(*d*) As to the further information with which the solicitor should be prepared, see p. 84, post.

inn where the necessary accommodation can be obtained. It must, however, be so arranged that the alleged lunatic can attend, if desirous of doing so, or at any rate that the master and the jury, if there be a jury, may have easy access to him. In a town, where the inquiry is by a jury, the masters prefer a court, if there be one, to an inn, as leading to less expense (*e*). The principles regulating the place for holding the inquiry in certain cases will be found discussed below (*f*).

On the solicitor attending them with the necessary information on this subject the masters will appoint a convenient day for holding the inquiry—inquiries are taken by them in rotation—and will thereupon sign a precept which, when the inquiry is without a jury, is addressed to the solicitor having the carriage of the proceeding, and is retained by him; but when an inquiry by jury is directed, is addressed to the sheriff of the county in which the inquiry is to be made, and the solicitor should then take it to the under-sheriff of that county. In any case it is prepared by the solicitor who has the carriage of the commission, and bears a seal annexed. Where a jury is required, it directs the sheriff to summon a jury of twenty-four persons (*g*) to make the inquiries directed by the order (*h*).

The court of the master an open court.

In accordance with 1 Hen. 8, c. 8, the third section of which provided, "that every escheator and commissioner should sit in convenient and open places according to the statutes theretofore made, and that the said escheators and commissioners should suffer every person to give evidence openly in their presence to such inquest as should be taken before any of them upon pain of 40*l*." (*i*), and

(*e*) Elmer, p. 16. Full directions as to these points will be furnished on application at the master's office.

(*f*) Infra, pp. 73 *et seq.*

(*g*) Elmer, p. 145.

(*h*) Ib. pp. 15, 16. The proceeding being a prerogative proceeding, no warrant from a palatinate jurisdiction is required, as in certain other cases for summoning a jury in any such jurisdiction. Ib. p. 21.

(*i*) Ante, p. 48.

Number of the jury.

which required the verdict of twelve men to confirm the claim of the prerogative, the court of the master is always an open court; and when the inquiry is by jury it is still required that there shall be at least twelve consenting voices to return a verdict against the alleged lunatic (*k*), though the actual number of jurymen may be varied at the discretion of the lord chancellor. Absolute unanimity among all the jurymen is not, however, required, since, if twelve concur in the verdict, it will be sufficient, although others refuse to join (*l*).

How empannelled

The sheriff empannels persons living in the immediate neighbourhood of the alleged lunatic's residence whose names appear on the special jury list; but juries may, and as the expense is less, where the property is small it is desirable they should, be summoned from the common jury list. The ordinary rules of the Common Law Procedure Act, 1852, with regard to juries, apply in the case of an inquest in lunacy (*m*).

Attendance of witnesses, how enforced.

The attendance of a witness at the inquiry, whether it be with or without a jury, is obtained by a summons under the hand and seal of the master. Blank forms of summonses are furnished at the office of the masters in lunacy; the solicitor should fill up and address a sufficient number of these, and obtain the signature of the master to them. The summonses are issued by the masters as incident to their office. They are served by delivery of a true copy and production of the original in the ordinary way.

Production of alleged lunatic, how provided for.

If the persons having the alleged lunatic in their custody refuse or are unwilling to produce him, a warrant for his production at the execution of the commission, written on paper, should be signed and sealed by the master in lunacy, and a copy of this warrant should be served on such persons as are supposed to have the custody of the alleged lunatic's

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(*k*) An inquisition might be set aside on the ground of a refusal by the sheriff to hear evidence. *R.* v. *Daly*, 1 Ves. 270.

(*l*) 53 Vict. c. 5, s. 97, and see *Re Windham*, 31 L. J., N. S., Ch. 721.

(*m*) See also 33 & 34 Vict. c. 77, ss. 22, 23.

person (*n*). Moreover, on application to the judge in lunacy, when necessary, an order may be obtained for the production of the alleged lunatic at the inquiry, and a person disobeying this order will be guilty of a contempt (*o*).

The evidence.

The evidence must be directed to the point that the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself and his affairs (*p*). Except under special circumstances, no evidence as to anything done or said by the alleged lunatic, or as to his demeanour or state of mind at any time being more than two years before the time of inquisition, is receivable in proof of insanity (*q*). It may be specially found and certified that the alleged lunatic is capable of managing himself and not dangerous though incapable of managing his affairs (*r*). The facts which are important for the purpose, and the relative value of various kinds of evidence, will be considered in the general chapter on Evidence (*s*). The powers of the master in respect of the evidence to be used at an inquisition are the same as have already been considered in respect of evidence used before them on proceedings in their office (*t*).

Inquisition prepared in duplicate.

To conclude the account of the proceedings antecedent to the inquiry, it should be added that duplicate forms of the inquisition in blank, on paper and parchment respectively, must be prepared, to be filled up by the master on the termination of the inquiry (*u*).

Sect. 2.—*Procedure on the Inquiry.*

On opening the inquiry, where there is a jury, the under-sheriff calls over the panel of the jury. The general com-

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(*n*) 53 Vict. c. 5, s. 114; *Ex parte Lund*, 6 Ves. 781.

(*o*) *Re Lord Wenman*, 1 P. Wms. 701.

(*p*) 53 Vict. c. 5, s. 98, sub-s. (1); ante, p. 51.

(*q*) Ib.

(*r*) 53 Vict. c. 5, s. 98 (2).

(*s*) Et ante, pp. 7 *et seq.*

(*t*) Ante, p. 35.

(*u*) Elmer, p. 21.

mission and special order, or the special commission (as the case may be), are then read and the jury are sworn. The master explains the nature and object of the inquiry, the principles of law respecting it, and the several points to which the attention of the jury is to be directed (*x*).

After this preliminary address, or, where there is no jury, immediately on the opening of the inquiry, the counsel for the petition (if any) states the case, with such observations as may be necessary. In the absence of counsel the master himself states such a case as is shown by the affidavits upon which the inquiry issued. The witnesses in support of the petition are then examined and cross-examined as in other cases. Where the inquiry is before a divisional court the alleged lunatic must himself also, if he is within the jurisdiction, be examined before the taking of evidence is commenced, and at the close of the proceedings, before the jury consult as to their verdict, unless the presiding judge shall otherwise direct; and the examination is to be in open court, or in private, at the judge's discretion (*y*). In inquiries before the master, according to established custom, the lunatic will be examined by the master or the jury, if any, all other parties being absent, and he has a right to insist on the examination as well as to be present at the execution of the commission (*z*).

Personal examination of the alleged lunatic.

We have already (*a*) pointed out the proper measures to insure the production of the alleged lunatic at the hearing. When the lunatic has been carried out of the jurisdiction to avoid his production, the commission, it is said, may be executed in the absence of the alleged lunatic (*b*). When he is secreted within the jurisdiction, the execution of the commission without inspection may be treated as a ground for superseding the commission and issuing a new one (*c*).

Where alleged lunatic carried out of jurisdiction.

Where secreted within the jurisdiction.

(*x*) Ib. pp 18 *et seq.*

(*y*) 53 Vict. c. 5, s. 94 (2).

(*z*) *Ex parte Cranmer*, 12 Ves. 445.

(*a*) Ante, p. 68.

(*b*) *Halse's case*, cit. ap. 2 Ves. 403. Though petitioners may be empowered to take proper steps for bringing the alleged lunatic to this country for the purpose of the inquiry, post, p. 74.

(*c*) *Halse's case*, ubi sup.

Object of personal examination.

The personal examination of the alleged lunatic is, said Cottenham, C. (*d*), for the purpose of assisting the jury in forming an opinion as to the state of his mind, and therefore they are at liberty to exercise their own observation and make their own inferences from the result of their observation. They are bound to draw their conclusion from the combined effect of the testimony of others who have good opportunities of judging, and the information derived from personal examination and inspection. That in a particular case they allow the greater weight to the latter kind of evidence gives no ground for quashing the inquisition.

Procedure at the execution of the commission continued.

After this personal examination the junior counsel for the petitioner sums up the evidence and observes upon it as in other cases. The counsel opposing the commission then addresses the jury and calls such witnesses as he may think expedient, either to contradict the evidence of the other side or to prove the sanity of the party. The counsel for the petitioner is thereupon entitled to reply, after which the evidence is summed up by the master for the consideration of the jury (*e*), twelve of whom must, as we have seen, concur in a verdict, whether it be that a party is of sound mind or not (*f*).

Verdict.

Completion of inquisition.

After a verdict (*g*) has been returned, the duplicate inquisition is completed by filling up the blanks which had been left. It is then read over by the solicitor who has the carriage of the commission, and if it is consistent with the verdict of the jury, the paper form is signed but not sealed by the jurymen agreeing to the verdict (*h*). The dissentient jurymen do not sign it (*i*). The parchment form is sealed with the seals of the jurymen and master, that the statute 36 Edw. 3, c. 13, may be fulfilled, which requires

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(*d*) *In re J. B.*, 1 Myl. & Cr. 542, 543, and Bk. IV., post.

(*e*) Elmer, pp. 18, 19.

(*f*) Cf. 1 Hen. 8, c. 8; ante, p. 47.

(*g*) Ante, p. 51.

(*h*) Elmer, pp. 21, 22.

(*i*) Cf. *Re Windham*, 31 L. J., N. S., Ch. 720.

that every inquisition shall be by indenture (*k*). An inquisition not by indenture has been held void (*l*).

After being thus signed and sealed respectively, both copies of the inquisition are handed by the foreman of the jury to the master, who thereupon signs each of them, and annexes that on parchment to the order or orders for the inquiry or to the commission as the case may be, adding the following words or some other similar return :—"By virtue of Her Majesty's general commission and this order (*or* 'of her Majesty's general commission and these orders,' *or* 'of her Majesty's special commission') I have made the inquiry thereby directed, as appears by the inquisition hereto annexed" (*m*).

Where no jury.

Where there is no jury the inquisition, written in the manner indicated above, is filled up and signed by the master only, whose seal is also attached to the parchment form. The return, as above given, is then indorsed, and the inquisition annexed to the order or special commission (*n*). The inquisition so made has the same effect as an inquisition before a jury (*o*).

Filing of inquisition.

In any case the commission or order, with the inquisition so annexed and so endorsed as aforesaid, is then filed by the master in the central office, where an office copy of the inquisition is obtained (*p*). The inquisition on paper is retained by the solicitor who has the charge of the commission, it used to be said, on behalf of the jury (*q*).

(*k*) *Lord Powis' case*, Dy. 170, a.

(*l*) *Barantine's case*, Dy. 170, b.

(*m*) Elmer, p. 22. Under 1 Hen. 8, c. 8, when the jury were ready to return their verdict and offered to do so, the commissioners were bound to receive it under a penalty of 100*l*.

(*n*) Elmer, ubi sup.

(*o*) 53 Vict. c. 5, s. 95.

(*p*) See 8 Hen. 6, c. 16 ; 18 Hen. 6, cc. 6, 7 ; 23 Hen. 6, c. 16 ; 1 Hen. 8, c. 8 ; *Re Matthew*, cit. ap. Shelf. Lun., p. 136. Furthermore the inquest must be brought into the office with the commission or order, and cannot be received on the oath of the party. *Moile* v. *Earl of Warwick*, 1 Leon. 65. If from any accident the commission or order is lost after inquisition found, it seems that the proper officer will be directed to make out a duplicate of the commission or order, and for the masters to annex to such duplicate, when sealed, the inquisition which had been taken, and to return the same forthwith. *Ex parte Raine*, 19 Ves. 589.

(*q*) Conf. 1 Hen. 8, c. 8. Where

Sect. 3.—*Of the Place at which the Commission should be executed.*

Ordinary rule,

The common order of the judge in lunacy directs that the commission be executed at or near the place of abode of the alleged lunatic when he is resident within the jurisdiction, and this is the usual practice, though it is not always followed (*r*). This rule, however, will not be departed from merely for the convenience of the witnesses (*s*), much less of counsel (*t*); but where there is the further fact that there is danger of the jury being influenced by strong local feeling (*u*), or that the lunatic has lived for some time in past years at the place to which it is proposed to transfer the inquiry (*x*), or that he has had for many years no fixed place of residence (*y*), or even from a clear motive of economy, where the property is small (*z*), the cases tend to show that the transfer will be allowed.

where departed from.

Other circumstances may in particular cases determine the place for holding the inquiry; *e.g.*, where it is important to ascertain the time when the lunacy commenced, the commission may be executed among persons who knew the state of the individual prior to the event to which, it may be, the lunacy is imputed by some of the parties interested (*a*).

Forcible removal insufficient to

It need hardly be added that a forcible removal of the alleged lunatic into another county, for the purpose of

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there is a clerical error or omission in the duplicate usually filed in the office, it seems that the other duplicate may be ordered to be filed. *Re Laugham*, 1 Jur. 375.

(*r*) *Ex parte Southcot*, 2 Ves. sen. 401; *Ex parte Hall*, 7 Ves. 261; *Ex parte Baker*, 19 Ves. 340; *In re Anon., an alleged lunatic*, 18 Ch. D. 26. Where the alleged lunatic had a town and country residence, both in the county of Middlesex, the commission was ordered to be executed at or near either of such places of abode as the commissioners should direct. *In re Jervis*, cit. ap. Shelf. Lun., p. 122.

(*s*) *Ex parte Baker*, 19 Ves. 340; *Re Jepson*, 2 Jur. 200.

(*t*) *Ex parte Baker*, ubi supra.

(*u*) *In re Anon., an alleged lunatic, supra.*

(*x*) *Re Green*, cit. ap. Shelf. Lun., p. 123.

(*y*) *Re Mills*, 2 My. & Cr. 39, n.

(*z*) *Re Waters*, 2 My. & Cr. 38.

(*a*) *Ex parte Smith*, 1 Swanst. 6.

change the place of inquiry.

thereby determining the place in which the inquiry should be held, is ineffectual (*b*).

Where alleged lunatic out of jurisdiction.

Where the alleged lunatic is out of the jurisdiction, the inquisition should be executed at the place in England where his mansion-house or other property is situated (*c*); if the lunatic have no mansion-house or property, then at his English residence (*d*); and if he has no such residence, then in the county of Middlesex (*e*).

Practice where the lunatic has been carried out of the jurisdiction, or is likely to be.

It does not seem that the execution of a commission at a place other than that directed will necessarily, although it may, be a ground for quashing the inquisition (*f*).

Even before the commission has issued, the judge in lunacy will, if possible, prevent the removal of an alleged lunatic out of the jurisdiction (*g*). And where the removal has already been effected, before the commission issues under which the alleged lunatic is found to be of unsound mind, an order may be made that he be brought back to England (*h*); but it should be referred to the master to appoint a proper person to inquire whether the lunatic can be moved without danger or injury to his health (*i*). An order to prevent the removal of an alleged lunatic out of the jurisdiction will not be made except upon affidavits which satisfy the court that the party is a fit subject for a commission of lunacy, and that there is reasonable apprehension of such a removal being contemplated (*k*).

In a proper case, an order may be obtained for the protection of the alleged lunatic from confinement, in case he shall come to this country to attend the inquiry (*l*).

(*b*) Ib.

(*c*) *Ex parte Southcot*, 2 Ves. sen. 401.

(*d*) *Re Richard Stevens*, cit. ap. 2 Coop. T. L. C. 150.

(*e*) *Re Hodsell*, cit. Amb. 110; *Re Lyon*, cit. 2 Coop. T. L. C. 150; *Re Webb*, 2 Coop. T. L. C. 145; *Re Scott*, 22 W. R. 748.

(*f*) *Ex parte Hall*, 7 Ves. 264.

(*g*) *Lady Marr's case*, Amb. 82; *Ex parte Walsh*, I. R., 8 Eq. 506.

(*h*) *Re Wykeham*, 1 Turn. & Russ. 537.

(*i*) Ib.

(*k*) Shelf. Lun., p. 129.

(*l*) *Re Naylor*, 1 N. R. 173; cf. *Re Dyce Sombre*, 1 Phill. 436.

Sect. 4.—*Of Quashing the Inquisition.*

Grounds on which an inquisition may be quashed.

An inquisition may be quashed, (1) because the return is not consistent with the issue (*m*), though an accidental mistake in the christian name of the party is immaterial (*n*); (2) on the refusal of the person conducting the inquiry to hear evidence (*o*), or other misconduct of that person (*p*), the misconduct of the jury (*q*), and the like. But the fact that the commission has been executed at a different place to that directed by the order (*r*), or without notice given to the person named in the order (*s*), or that the jury have given more weight to their own inspection of the lunatic than to other evidence (*t*), is not a ground for so quashing it.

A new inquiry may be ordered.

Where an inquisition is quashed, a new inquiry will in proper cases be directed without a new petition (*u*). It is well settled that a *melius inquirendum* cannot be directed in lunacy (*x*). There is a case on record in which no less than three commissions were granted before the alleged lunatic was found of unsound mind (*y*).

(*m*) *Ex parte Cranmer*, 12 Ves. 449; *Ex parte Freak*, Sel. C. C. 47.

(*n*) *Re Crawford*, 1 Myl. & Cr. 240.

(*o*) *R.* v. *Daly*, 1 Ves. sen. 270; and cf. 1 Hen. 8, c. 8.

(*p*) Ib.

(*q*) *Ex parte Roberts*, 3 Atk. 6; cf. 1 Ridg. P. C. 541.

(*r*) *Ex parte Hall*, 7 Ves. 261.

(*s*) Ib.

(*t*) *Re J. B.*, 1 Myl. & Cr. 542, 543; ante, p. 70.

(*u*) *Ex parte Atkinson*, Jac. 333; *Ex parte Roberts*, 3 Atk. 6; 1 Ridg. P. C. 541; *Halse's case*, 2 Ves. sen. 403; *Ex parte Cranmer*, 12 Ves. 454; *Re Holmes*, 4 Russ. 182; *Re Bennett*, 1 Jur. 469.

(*x*) *Ex parte Cranmer*, 12 Ves. 454; *Ex parte Atkinson*, Jac. 333; *Re Holmes*, 4 Russ. 182.

(*y*) *Lord Wenman's case*, cit. ap. 2 Ves. sen. 408.

CHAPTER V.

OF THE TRAVERSE OF THE INQUISITION.

THIS traverse is the usual process by which a person found lunatic, or others on his behalf, may set aside the decision or verdict so finding him (*a*).

Origin of the traverse and its advantage.

Traverse was the ordinary remedy provided for the subject whose estates had been seized by the crown, and it had the merit as such of enabling the subject to establish his right by merely refuting the facts proved by the office (*b*), instead of its being necessary, as it had been in the *monstrans de droit* and petition of right, to prove his whole title affirmatively (*c*). In other words, he enjoyed the privilege of a defendant (*d*). This benefit of traverse was after long delay extended to inquisitions in lunacy by 2 & 3 Edw. 6, c. 8, the 6th section of which provided that if any person should be unduly found idiot or lunatic, every person and persons aggrieved by such office or inquisition might have his and their traverse in the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions and offices found.

(*a*) It is said that one found diot (F. N. B. 2, 233 ; St. Pr. Reg. 36) or lunatic (*Re Heli*, 3 Atk. 635) might, by way of appeal, appear *coram rege in concilio* (qu. the Court of Chancery, *Ex parte Southcot*, Ambl. 112) and pray to be examined. See also 9 Rep. 31 a ; Bac. Abr. "Id. and Lun." (B) ; 3 Bl. Comm. 332. For the remedy where the lunatic has been so found on trial before the high court, vide infra, p. 82.

(*b*) 34 Edw. 3, c. 14 ; 36 Edw. 3, c. 13 ; 4 Rep. 54.

(*c*) 4 Rep. 54, 56 a ; Gilb. Exch. 172.

(*d*) *Reg.* v. *Mason*, 2 Salk. 447 ; *Rex* v. *Roberts*, 2 Str. 1208 ; 14 St. Tr. 154.

Rules as to traverse in L. Act, 1890.

Definite rules as to traverse are contained in the L. Act, 1890. Any person desiring to traverse an inquisition, not being a verdict upon an issue tried in the high court, may within three months after the return of the inquisition apply for that purpose to the judge in lunacy, who is required to hear and determine the application, and, in his order to be made thereon, to limit a time, not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, are to proceed to trial of the traverse. He may by the same or any other order direct that the person desiring to traverse, not being the person the object of the inquisition, shall, within three weeks next after the date of the next order, give sufficient security to, and to the satisfaction of, the masters for all proper parties proceeding to trial within the time for that purpose limited (*e*).

Application for leave.

Security.

Right to traverse, how barred.

Every person who does not within the appointed time apply for a traverse, or who neglects or refuses to give security as above, or who does not proceed to trial within the appointed time, is absolutely barred of the right to traverse, unless the judge in lunacy, under the special circumstances of any particular case, extends the time upon such terms as he thinks just (*f*).

The Persons entitled to traverse.

The alleged lunatic.

1. And first, of course, the alleged lunatic himself is entitled on this ground to traverse it, either in person or with the judge's permission by attorney (*g*). But the alleged lunatic was usually, and is now invariably, required to appear before the judge to be examined previously as to his competence to form and express a wish to traverse (*h*).

Can the alleged luna-

From this requirement considerable doubt has arisen in

(*e*) 53 Vict. c. 5, s. 101.
(*f*) Ib. s. 102.
(*g*) *Ex parte Roberts*, 3 Atk. 7 ; *Anon.*, Mos. Ch. Rep. 71 ; *Smithie's case*, cit. 3 Atk. 7 ; *Re Cumming*, 1 De G., M. & G. 537.
(*h*) Ambl. 112.

tic traverse as of right.

the past as to whether the right of the alleged lunatic to traverse the inquisition was really as absolute as on the face of the statute 2 & 3 Edw. 6, c. 8, it appeared to be.

Opinions of the judges.

The opinion of Lords Hardwicke (*i*) and Thurlow (*k*) appears to have been that the permission to traverse was in the absolute discretion of the lord chancellor. Lord Rosslyn (*l*), on the other hand, said "The traverse is *de jure;* it is no favour;" and this view was adopted by Lord Eldon (*m*), Lord Cottenham (*n*), Lord Truro (*o*), and finally, by Lord St. Leonards in the classical case on this point, *Re Cumming* (*p*).

Observations.

But while admitting the right, these judges did not deny the discretion, and the co-existence of the two may be explained as follows:—A person may be insane, so insane as to satisfy the judge in lunacy absolutely that under no possible circumstances can a jury do otherwise than find him lunatic, and yet he may be perfectly competent to form and express a wish for a traverse. Now, if the traverse were a matter of discretion merely, it would be the duty of the judge in lunacy to refuse it as an useless waste of the lunatic's estate; but it is a matter of right, and therefore he cannot refuse it, though he may refuse to make any allowance out of the property of the lunatic for the purpose of supporting it. On the other hand, if the judge is satisfied on the examination, not merely that a jury will find the person lunatic, but that he is incapable of forming and expressing a wish for a traverse, as, *e.g.*, in the case of raving *mania* or extreme *dementia*, then he has, and will exercise, a discretion to refuse a traverse, which the lunatic has never in reality demanded at all (*q*).

(*i*) *Ex parte Roberts*, 3 Atk. 5; *Ex parte Barnsley*, 3 Atk. 184.

(*k*) *Re Fust*, 1 Cox, 418.

(*l*) *Ex parte Wragg*, 5 Ves. 450; *Ex parte Ferne*, 5 Ves. 832.

(*m*) *Ex parte Ward*, 6 Ves. 578; *Sherwood* v. *Sanderson*, 19 Ves. 287.

(*n*) *Re Bridge*, Cr. & P. 338.

(*o*) *Ex parte Hartley*, *Ex parte Loveday*, cit. ap. *Re Cumming*, ubi inf.

(*p*) *Re Cumming*, 1 De G., M. & G. 537.

(*q*) *Re Bridge*, *Re Cumming*, ubi sup.

A *habeas corpus* may issue to produce the lunatic for examination by the judge in lunacy (*r*). Where he is abroad, an order may be made restraining the committee from interfering with him on a temporary visit to this country for the same purpose (*s*). Production of lunatic to traverse. Protection of lunatic while traversing.

2. The alienee of the lunatic may traverse the inquisition (*t*). Under this term is included not merely one to whom the legal estate has actually passed, but any person having such an interest in or title to the property as would constitute him the owner in equity (*u*). In one case the passing of a decree against a defendant in a chancery suit was stayed to give him liberty to traverse the inquisition (*x*). The alienee of the lunatic.

An alienee's traverse must go to set aside the verdict absolutely; where the verdict is not inconsistent with the facts alleged by the petitioner, an issue will be the proper course (*y*). Now that the issue on the inquisition has been generally limited to time present, traverses by alienees should be rare.

3. A husband or wife may certainly be admitted to traverse an inquisition finding the other spouse a lunatic, especially where the *tempus a quo* is prior to the marriage (*z*). Husband or wife.

However, parties other than the alleged lunatic may put themselves into a position which will cause the refusal to them of the right to traverse (*a*). This the court can take into consideration, on the question whether or not they are persons "aggrieved." Third parties may deprive themselves of the right to traverse.

An inquisition cannot be traversed after the death of the lunatic, for his personal attendance may be required (*b*). No traverse after the death of the lunatic.

(*r*) *Re Turner*, cit. ap. Shelf. Lun., pp. 150, 151.

(*s*) Cf. *Re Dyce Sombre*, p. 204, post.

(*t*) *Att.-Gen.* v. *Parkhurst*, 1 Ch. Cas. 113; *Sherwood* v. *Sanderson*, 19 Ves. 287; Skinn. 178.

(*u*) *Ex parte Hall*, 7 Ves. 260; *Niell* v. *Morley*, 9 Ves. 478.

(*x*) *Att.-Gen.* v. *Parkhurst*, 1 Ch. Cas. 112.

(*y*) *Hall* v. *Warren*, 9 Ves. 605, 609; *Ex parte Ferne*, 5 Ves. 832.

(*z*) *Re Fust*, 1 Cox, 418; *Re Nugent*, 2 Moll. 517.

(*a*) Ib., and *Ex parte Ward*, 6 Ves. 579.

(*b*) *Re Roberts*, 3 Atk. 312.

Nor, it is submitted, would persons entitled in expectancy under the lunatic's will be allowed to traverse (*c*). Of course the finding of the jury does not conclude them (*d*).

Who bound by the traverse.

The lunatic's traverse will not bind an alienee, unless a party to it or consenting (*e*); when the alienee and lunatic join, both are bound (*f*). Formerly a traverse was sometimes granted upon terms which implied the consent of some third person to be bound by it (*g*); and a person submitting and afterwards refusing to be bound has been held guilty of a contempt (*h*). It is doubtful whether any such terms would be imposed now.

The crown's remedy if dissatisfied with a verdict.

The crown cannot traverse an inquisition of lunacy, nor is the usual remedy of a *melius inquirendum* available, though by some stated to be so (*i*); the proper remedy is to issue another commission (*k*).

Procedure on a Traverse.

The application for a traverse is by petition (*l*). If leave is granted the order will contain directions as to the time of filing the traverse and proceeding to trial, and such other matters as circumstances may require. An office copy of the order must be left at the Central Office, where the traverse is drawn up and filed. It is usually prepared by the petitioner's solicitor.

When the traverse has been filed, an office copy must be taken by the prosecutor of the commission (*m*), who

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(*c*) On the ground that they have no existing rights; cf. *Sackville* v. *Aylworth*, 1 Vern. 105. But see *Re Tayleur*, L. R., 6 Ch. 416.

(*d*) Post, Bk. IV.

(*e*) *Ex parte Roberts*, 3 Atk. 7.

(*f*) *S. C.*, 3 Atk. 312.

(*g*) Bull. N. P. 216; 3 Atk. 184.

(*h*) 3 Atk. 308; 4 Br. Ch. Cas. 238 n.

(*i*) 8 Rep. 168 b; *Re Roberts*, 3 Atk. 6; *Knight* v. *Duplessis*, 2 Ves. sen. 555; 4 Madd. 313; Shelf. Lun., p. 152.

(*k*) *Ex parte Atkinson*, Jac. 333; ante, p. 75.

(*l*) See R. L. 1890, 13.

(*m*) For the practice when the prosecutor of the commission refuses to take any further steps, see *Re Crosbie*, 5 Ir. Jur., N. S. 257.

replies in the name of the attorney-general on behalf of the crown. Neither the committee nor the prosecutor of the commission can plead or join issue in his own name in the matter (*n*).

Trial of the traverse.

On issue joined, the record is carried into the Queen's Bench Division of the High Court, the Queen's Bench having been the only court in which the traverse could be tried, and a *venire facias* will be awarded returnable into that court (*o*). The trial may be either by ordinary or special jury (*p*), and need not take place in the county in which the commission was executed, should circumstances render some other county desirable (*q*). The court will not countenance delay on the part of the petitioner for a traverse (*r*); but the trial may be postponed on the ground of the absence of material witnesses or the want of sufficient time to prepare for it (*s*).

New Trials.

How obtained,

No person may traverse more than once, but if the judge in lunacy is dissatisfied with the verdict, he may direct one or more new trials on the traverse, as was usual in the case of issues directed by the Court of Chancery (*t*). It would seem that the application for such new trial should therefore be made to the Court of Lunacy in the first instance (*u*); but before 6 Geo. 4, c. 53, in which the

(*n*) *Thorn* v. *Coward*, 2 Sid. 124.

(*o*) 4 Inst. 80; 1 Eq. Cas. Abr. 128; *Jeffreson* v. *Morton*, 2 Saund. 6, 23; *Ex parte Wragg*, 5 Ves. 452; Elmer, p. 79.

(*p*) *Ex parte Ferne*, 5 Ves. 832.

(*q*) *Re Nugent*, 2 Moll. 517. The traverse is tried at the assizes. *Ex parte Ferne*, 5 Ves. 832. The alleged lunatic must appear in person. *Re Roberts*, 3 Atk. 312.

(*r*) *Re Turner*, cit. ap. Shelf. Lun., p. 146; and cf. *Rex* v. *Roberts*, 2 Str. 1208.

(*s*) *Re Turner*, ubi sup. For a case in which the prosecutor of the commission himself became incapable, see *Re Armstrong*, 2 De G. & J. 123.

(*t*) 53 Vict. c. 5, s. 103, but see *Ex parte Kensington*, Coop. C. C. 96; *Bowker* v. *Nixon*, 6 Taunt. 444; see 4 Maule & S. 196; *Morris* v. *Davis*, 3 Russ. 318; *Footner* v. *Figes*, 2 Sim. 319; *Ex parte Barker*, 1 Cox, 418; *Fraser* v. *Lloyd*, 19 Ves. 317; *R.* v. *Knox*, Coop. C. C. 98.

(*u*) Cf. Shelf. Lun., p. 155.

above provision first appeared, application for a new trial of a traverse was made with success in the King's Bench (*x*), and there is nothing in later acts (save the Judicature Acts) to take away the jurisdiction, which was by the Jud. Acts vested in the Queen's Bench Division of the High Court (*y*).

in the place of a traverse where inquiry before the high court with a jury.

Where the question of lunacy has been tried in the first instance in some branch of the High Court, a new trial or new inquiry takes the place of the traverse itself, which is not in that case applicable. An application for the new trial or inquiry must be presented to the judge in lunacy, and within three months of the original trial (*z*).

Proceedings pending a Traverse.

Old practice.

Under 8 Hen. 6, c. 16, and 18 Hen. 6, c. 7, the grant of the custody of the estate was arrested for a month after the return of the inquisition to allow of a traverse. Whether a grant within the month was voidable or void is not plain. So where a traverse had been allowed the grant was usually suspended until further order. But the court has frequently interfered, nevertheless, to protect the property, either by appointing a committee *ad interim*, or a receiver, or by restraining all disposition of, or dealing with it. Such orders must, however, be at the risk of the petitioners if the alleged lunatic is after all found to be sane (*a*).

(*x*) *R.* v. *Roberts*, 2 Str. 1208.

(*y*) 36 & 37 Vict. c. 66, s. 34. By the R. S. C. every motion for a new trial or to set aside a verdict, finding or judgment where there has been a trial thereof, or if any issue therein with a jury is to be entered in the Court of Appeal, in the same way as motions by way of appeal to the Court of Appeal are now entered where there has been a trial without a jury. The motions will be subject to Ord. XXXIX., rule 4, and will be brought before the Court of Appeal in like manner as an appeal.

(*z*) 53 Vict. c. 5, s. 104.

(*a*) *Re Heli*, 3 Atk. 635; *Re Holmes*, 4 Russ. 186; cf. Shelf. Lun., pp. 159—162, and the cases there cited. As to committees, *ad interim*, vide post, p. 130, and cf. *Re Bridge*, Cr. & P. 338.

Since 6 Geo. 4, c. 53, and now under the L. Act, 1890, s. 108, the judge in lunacy may, notwithstanding that proceedings are pending for a traverse, make orders for the custody of lunatics so found by inquisition, and the management of their estates, or in a proper case for the commitment of the estate without any order for the custody or commitment of the person (*b*). Modern practice. Statutory power.

Further, by the L. Act, 1890, provision is made for the payment of costs notwithstanding a successful traverse (*c*), on which see a later chapter. It is in the discretion of the court to allow the lunatic part of his estate for a traverse: where no order has been made, but the traverse has been properly brought and conducted, the solicitor's costs will be a debt against the estate (*d*).

For the alternative power of the judge in lunacy to supersede a commission upon terms instead of allowing a traverse, see the chapter on Supersedeas (*e*).

Return of the Traverse.

The verdict on a traverse is returned into the Central Office. If the finding of the inquisition is confirmed, the proceedings in lunacy continue; if reversed, the lunatic is at once restored to the enjoyment of independence and property (*f*).

(*b*) See 53 Vict. c. 5, ss. 105, 106.
(*c*) 53 Vict. c. 5, s. 109.
(*d*) *Re Bridge*, Cr. & P. 388, 3 post, Bk. I. Pt. i. c. 20.
(*e*) Post, pp. 205, 206.
(*f*) Elmer, p. 80.

CHAPTER VI.

OF THE INQUIRIES BEFORE THE MASTERS UPON INQUISITION FOUND.

Summons and Evidence in support.

The alleged lunatic having been duly found of unsound mind, and incapable of managing himself or his affairs (or incapable of managing his affairs only) (*a*), the matter of the lunacy is referred to the masters in lunacy jointly and severally (*b*), but all matters in the same lunacy are so far as convenient to be conducted before the same master (*c*).

Time of holding first inquiries.

The party having the conduct of the proceedings immediately after inquisition found takes out a summons before the masters for inquiries (*d*).

The inquiries will be made at the masters' office. Evidence will be in readiness of the inquisition and verdict, and a pedigree showing who are the heir at law and next of kin respectively of the lunatic (*e*), and stating also what are his age, position in life and residence, the nature of his lunacy, the names and position of the proposed committees of his person and estate, and also of what his property and income consist, and what should be allowed for his past and future maintenance (*f*). There should also be a statement as to whether or no there are any debts due from the lunatic, and if so, what is their nature and amount, to whom they are due and owing, and in what way and out of what

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(*a*) 53 Vict. c. 5, s. 98, sub-s. (2).
(*b*) L. R. 1890, 115.
(*c*) Ib.
(*d*) R. L. 1890, 27.
(*e*) Serve the Attorney-General where no next of kin. See *Re Early*, Coop. T. L. C. 107; but not the Attorney-General of the Duchy of Lancaster as well in cases of property within the Duchy, *In re Kershaw*, 21 Ch. D. 613.
(*f*) R. L. 1890, 27.

funds it is proposed to liquidate them, and evidence of any disputed claims against the lunatic or his estate (*g*).

The materials for the evidence should, where practicable, have been collected by the solicitor who has the conduct of the proceedings before the time of opening the inquiry (*h*), for in the event of the alleged lunatic being so found, it is convenient, whilst the family are at hand, to go into the necessary subsequent inquiries directed by the 27th of the Rules in Lunacy, 1890, on the spot and by means of *vivâ voce* evidence. The adoption of this course is sometimes attended by a considerable saving of trouble, time and expense, and the masters, when fixing a time for holding the inquiry, should be consulted with reference to it. The masters may direct the evidence to be taken orally, or partly orally and partly by affidavit; in this latter case the affidavits should not be sworn until after verdict found, and should be entitled in the matter of the lunacy, not in the matter of A—— Z——, a supposed lunatic (*i*).

Evidence in support.

The inquiry of the master is, of course, directed to the various matters comprised in the summons. The nature of the inquiry and the reasons determining the decision of the master will be found discussed under the several heads in the succeeding chapter of this treatise; those, namely, on the heir and next of kin of the lunatic, the debts and liabilities of the lunatic, the appointment of committees, the committee of the person, the committee of the estate, receivers, and the allowance for maintenance.

The master's certificate is made, objected to or confirmed, and referred in the manner already indicated as to certificates in general (*k*).

(*g*) R. L. 1890, 30.

(*h*) Elmer, p. 151.

(*i*) Elmer, p. 28. See R. L. 1890, 89, 90, 91, as to formal matters in connection with affidavits.

(*k*) Ante, pp. 36, 37.

CHAPTER VII.

OF THE HEIR AT LAW AND NEXT OF KIN OF THE LUNATIC.

Interest of next of kin, &c., in the lunacy.

It is a principle, to which in the course of this treatise attention will frequently and of necessity be drawn, that the persons presumptively entitled to the property of the lunatic on his decease are not, as such, the objects of special solicitude or attention, though their rights of ultimate succession will not be interfered with unnecessarily (*a*). Their interest in the estate is no present one, to entitle them to assistance or support from its revenues during the life of the lunatic (*b*), or to control the quality in which it shall descend on his death (*c*). Until very recently they were held to be wanting in sufficient interest even to support a bill to perpetuate testimony as to a will purporting to dispose of it (*d*), nor even now can their right in this respect be regarded as fully established (*e*). In short, they have as little legal claim in respect of the property as they would have had if the present possessor had been sane, while the moral claim which might in that case have met with consideration from himself must be indeed strong to receive any consideration from the court.

Why called on to attend the proceedings.

At the same time, the judge in lunacy, a stranger to the lunatic, to his estate, his circumstances and affairs, requires inevitably the assistance of those who are naturally best

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(*a*) *In re Barker*, 17 Ch. D. 241 ; *In re Ryder*, 20 Ch. D. 514 ; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*b*) Vide post, Bk. I. Pt. i. c. 15.

(*c*) Vide post, Bk. I. Pt. i. c. 16 ; Bk. II. c. 12.

(*d*) *Sackville* v. *Aylworth*, 1 Vern. 105 ; Shelf. on Lun., pp. 433, 553.

(*e*) See *Re Tayleur*, L. R., 6 Ch. 416 ; *Re Gordon*, L. R., 10 Ch. 192.

able to furnish him with information (*f*); and if we look upon the next of kin, not as the persons presumptively entitled to the property, but as those whom the ties of blood as well as of family association have most closely connected with the lunatic, there is a special propriety in preferring them, whether in respect of obtaining the protection of the crown for the lunatic in the first instance, or in counselling and assisting in its administration afterwards. Add to this, that the persons who have expectant rights in the property are also likely to advise prudently and judiciously in respect of it, and the motives which lead the court to call for the next of kin and the heir at law of lunatics will have been fairly enumerated (*g*).

The duty of next of kin, &c., converted into a privilege.

But a custom, followed for centuries almost without exception, has changed what was but a liability into a privilege, which successive legislation, statutory and judicial, seeks rather to limit and control than to deny. This privilege of the next of kin and heir at law, and, it may be added, of the husband or wife (if any) of the lunatic, is an important feature in the law of lunacy. Its operation in respect of proceedings prior to the finding of the inquisition has been already considered (*h*). We may, therefore, commence with proceedings after inquisition found, the rules as to which now depend to a great extent upon the L. Act, 1890, and the rules in lunacy of the same year. In them it may be premised that the term next of kin includes heir at law, and the persons entitled under the statutes for the distribution of the estates of intestates (*i*). It comprises, therefore, the husband or wife, if any.

(*f*) *Re Amoy*, 2 C. P. Cooper, T. L. C. 105; *Re Meux*, ib. 106; *Re Howell*, *ib.* 107.

(*g*) Ib.; and *Ex parte Whitbread*, 2 Mer. 101, 103; *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69, 260; *Ex parte Bromfield*, 1 Ves. jun. 453; *Tullit* v. *Tullit*, Ambl. 370; *Ex parte Grimstone*, Ambl. 706; *Sergeson* v. *Sealey*, 2 Atk. 412.

(*h*) Ante, pp. 56, 57, 60-63.

(*i*) 53 Vict. c. 5, s. 341.

Inquiry as to next of kin.

1. Among the inquiries included in the summons taken out by the party having the conduct of the proceedings after inquisition found is that into the next of kin (*k*). The question is one which the solicitor who is employed in the carriage of the commission should have answered by the time the inquisition is held; and the names of the next of kin, with a pedigree of the family, were usually included in the state of facts formerly presented to the master, and under the present practice are still necessary for working out the inquiry now under consideration (*l*).

Cases in which the inquiry is dispensed with, deferred, &c.

In certain cases, however, this practice is departed from: (1) where the property of the lunatic is exempted from payment of fees and percentage, no inquiry is to be made without special order (*m*); (2) where the masters are of opinion that by reason of the smallness of the property or for any other reason an inquiry respecting next of kin should be dispensed with or deferred, or be carried on to a limited extent only, they are to certify accordingly instead of proceeding with the inquiry in the ordinary way (*n*); and (3) the judge in lunacy may in any case, by order, defer an inquiry respecting next of kin, or direct that the inquiry shall be carried on to such limited extent only, and under such restrictions as he thinks expedient, and he may direct that persons claiming to be next of kin or heir at law be left to make out their claim at their own expense, and may in any case, if he thinks it expedient, wholly dispense with the inquiry (*o*). Moreover, even where there has been no special direction from the judge in lunacy concerning the mode of conducting the inquiry, if the masters are of opinion that it is expedient that strict proof of pedigree should not be gone into, they may dispense with the same to such extent and in such manner as they think fit, and may require and receive such evidence as

(*k*) R. L. 1890, 27.
(*l*) Elmer, pp. 151, 155.
(*m*) R. L. 1890, 4.
(*n*) R. L. 1890, 36.
(*o*) R. L. 1890, 35.

they think sufficient respecting the family and the next of kin or heir at law (*p*).

Quis propinquior heres.

In the old writs an inquiry, "*quis propinquior heres*," was commonly included, in order that the crown might know to whom the estate should be delivered on the death of the lunatic (*q*). The jury, of later years, usually returned their ignorance on the question (*r*). The general commission to the masters includes no such direction, and the ordinary practice is to leave the matter to the investigation of the masters after the return of the inquisition in the manner above mentioned.

Finding of heir at law or next of kin not conclusive.

As the finding of the inquisition is not conclusive upon third persons (*s*), so *a fortiori* the finding of the heir at law or next of kin of the lunatic will not be conclusive (*t*); but the person found in the lunacy to be the heir at law will, *primâ facie*, be taken to be the heir; and to him in the absence of opposition the estate will be delivered on the lunatic's death (*u*).

Appointment of committees.

2. The next step is the appointment of committees.

Any of the next of kin is usually entitled without order to make an application for these offices, and to notice of any application made by others. Where, from any peculiar circumstances, an order is requisite, it will probably be made. An order which might discourage the next of kin and heir at law from attending, when the application for committees of the persons and estate is made, should be carefully avoided (*x*).

(*p*) R. L. 1890, 37. Where the pedigree is simple, an affidavit from an independent member of the family, or a friend verifying the facts as to the next of kin, will be sufficient. Where the pedigree is not simple, the master's direction should be taken before any expense is incurred in getting up evidence. Elmer, p. 152.

(*q*) *Re Fitzgerald*, 2 Sch. & Lef. 440.

(*r*) Shelf. Lun., p. 98.

(*s*) Post, Bk. IV.

(*t*) *Re Fitzgerald*, 2 Sch. & Lef. 440; *Ex parte Clarke*, Jac. 595; post, Bk. I. Pt. i. c. 19.

(*u*) *Re Ferrior*, L. R., 3 Ch. 175; and post, Bk. I. Pt. i. c. 19.

(*x*) *Re Howell*, 2 C. P. Coop. T. L. C. 107; *Re Meux*, ib. 106. As to the claim of the next of kin to be committees, see post, pp. 105, 106.

Attendance of next of kin at proceedings generally.

3. Under the Rules in Lunacy, 1890, unless the judge in lunacy may himself have dispensed with and disallowed the attendance on the proceedings of all or any of the next of kin, either wholly, or except at their own expense, or except upon special leave first obtained, the masters are directed, subject to the provisions of the rules, once in the matter of each lunatic so found by inquisition, and may as often as they think it expedient, determine which, if any, of the next of kin and what other persons, if any, are to attend the proceedings, or any particular proceeding (*y*). The power of the judge in lunacy to dispense with and disallow the attendance of the next of kin applies now to the heir at law (*z*), but formerly the heir at law had a right to notice of and attendance on the account of the committee of the estate (*a*). The person or persons, if any, to whom the masters have given liberty to attend are alone entitled to notice or allowed to attend *at the cost of the estate*, on any proceeding, except upon the special leave of the masters first obtained when the proceeding is before the master, and that of the judge in lunacy when it is before him (*b*). When the judge dispenses with or disallows the attendance of the heir at law or next of kin, such notice of attending the proceedings shall be given as shall be conformable with the order of the judge (*c*). The masters must certify the persons to whom they have given leave to attend (*d*).

The next of kin have in any case a right to attend the inquiry for appointment of first committees.

These provisions do not, however, apply to limit the general favour with which the next of kin are regarded, when making applications for the committees (*e*); and where the heir at law or next of kin are not represented at the original inquiry, the consideration of the persons to be chosen as committees is postponed (*f*).

Passing the

The principal class of proceedings to which the above

(*y*) R. L. 1890, 38, 39.
(*z*) R. L. 1890, 38.
(*a*) 16 & 17 Vict. c. 70, s. 81.
(*b*) R. L. 1890, 38, 39.
(*c*) R. L. 1890, 38.
(*d*) R. L. 1890, 39.
(*e*) *Re Howell*, 2 C. P. Coop. T. L. C. 107. So per Eldon, C., in *Re Meux*, ib. 107; ante, p. 89.
(*f*) Elmer, p. 27.

stated provisions are directed is that of passing the accounts of the committee of the estate. As a general rule but one attendance is allowed for the next of kin, exclusive of the heir at law, and one for the heir at law at the passing of the accounts (*g*). However, any of the next of kin are entitled, if they desire it, to attend the proceedings at their own expense, and may direct that notice of all proceedings be served upon them (*h*).

committee's accounts.

A distinction apparently exists, or at least existed between the privilege of the heir at law and that of the next of kin in respect of the administration of the lunatic's real estate.

Respective positions of heir and next of kin in regard to the administration of real estate.

"It is right," said Lord Cottenham, that "the person interested in the personal estate of the lunatic should be a party to what may be done, but not that he should actively interfere in the management of the estate." And again, "the person interested in the personal estate attends the proceedings in lunacy, but is not at liberty to carry in proposals (*i*). The letter of the Act of 1890 contains no such limitation in terms, but the opinion of Lord Cottenham would, in all probability, affect the practice.

A person interested in expectancy under the will of a lunatic executed before the lunacy does not stand in the same position as the next of kin with regard to being at liberty to attend proceedings. The application for this liberty by such a person was refused, although it was alleged that the next of kin had not the same interest in the matter as the applicant. It does not appear whether the application was for liberty to attend at the cost of the applicant or of the estate (*k*).

Persons interested under a will made by the lunatic.

By the R. L. 1890, r. 40, where an infant, being one of the next of kin and being at liberty to attend the proceedings, has no guardian, the master may by certificate appoint a fit person to be his guardian for the purposes of the lunacy. The guardian so appointed is thenceforth to

Infant next of kin.

Guardian.

(*g*) Elmer, p. 30; and cf. R. L. 1890, 42.

(*h*) Elmer, p. 30.

(*i*) *Re Webb*, 2 Phill. 532.

(*k*) *Re Scarlett*, L. R., 8 Ch. 739.

have all the same powers, authorities and discretion as if he had been duly constituted a guardian *ad litem* by the Chancery Division of the High Court. The masters may by certificate revoke any such appointment, and appoint another person to be guardian (*l*).

The manner in which the relation of heir at law or next of kin is considered in the appointment of committees, the allowance for maintenance, and the management and conversion of the lunatic's estate, forms so large a part of the several chapters on this subject as to need no separate treatment here.

Assignees of next of kin formerly considered,

A particular instance in which the court has taken notice of the interest of persons presumptively entitled, is that in which any of these persons have assigned their interests, and an order in the nature of a stop order on a fund in court in the lunacy has been made at the instance of the assignee (*m*). However, in *Re Wilkinson*, on an application by an assignee for an order in the form sanctioned in one case (*n*) by Lord Truro, the lords justices were of opinion that Lord Truro's order had been made *per incuriam*; and, saying that according to the present practice in lunacy no such order ever is made or will be made, dismissed the petition with costs (*o*). In a case where the next of kin of a lunatic had become bankrupt, it was held unnecessary to serve the assignees with a petition for an increased allowance for the lunatic (*p*).

but not now.

Finally, for the position and rights of the heir and next of kin on the decease of the lunatic, the reader is referred to the chapter on Proceedings after the Death of the Lunatic.

(*l*) R. L. 1890, 40; and cf. *Re Brown*, 1 Mac. & G. 201.

(*m*) *Re Alchin*, cit. 1 H. & T. 214; *Re Aubery*, cit. ib. 215; *Re Moore*, 1 Mac. & G. 103; *Re Pigott*, 3 Mac. & G. 268; but see *Re Welch*, cit. 1 H. & T. 215.

(*n*) *Re Pigott*, ubi sup.

(*o*) *Re Wilkinson*, L. R., 10 Ch. 73.

(*p*) *Ex parte Chambers*, 4 L. J., N. S., Ch. 175.

CHAPTER VIII.

OF THE DEBTS AND LIABILITIES OF THE LUNATIC.

Inquiry as to debts.

By r. 30 of the R. L. 1890, the masters are empowered, when it seems to them expedient, to inquire what undisputed debts, if any, are due from the lunatic, and to whom; and whether the same or any of them ought to be paid and out of what property; and they may entertain proposals for the settlement or payment thereof; and for the compromise of any disputed claim against the lunatic or his estate (*a*).

When made.

The inquiry is not in the case of simple contract debts bearing no interest usually preferred to the inquiry as to maintenance (*b*); but when the debts are secured or carry interest, the inquiry is preferred, because it is by reference to them that the allowance for maintenance must be fixed: and the same is said to be the case when the simple contract debts are large, or a provisional maintenance only will be approved of (*c*).

Advertisement for creditors.

The inquiry is prefaced by an advertisement for creditors in the London Gazette and other papers approved by the master, which is repeated after an interval usually of a month or six weeks; and creditors not coming in within the time fixed in the second advertisement are peremptorily excluded from the proceedings in the lunacy (*d*).

Rights of creditors, how far affected.

A creditor is not, however, bound to come in (*e*), nor does the inquisition deprive him of his remedy in the ordi-

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(*a*) R. L. 1890, 30.
(*b*) Elmer, p. 35.
(*c*) Ibid.
(*d*) R. L. 1890, 87; Elmer, pp. 29, 34.
(*e*) *Rock* v. *Cooke*, 1 De G. & S. 675.

nary courts (*f*), unless he has in any way been brought within the jurisdiction in lunacy (*g*). In that case he may be restrained, on his claim being allowed, from taking the usual steps to recover it (*h*); and accordingly the statute of limitations will not run against him during the lunacy, if for the convenience of the estate the debt is not paid (*i*). When, on the other hand, the debt is not allowed, it appears from one case that the statute runs from the date of disallowance (*k*). A creditor is brought within the jurisdiction not merely by coming in to prove, but by being employed in the lunacy, as, *e.g.*, solicitor or auctioneer (*l*), or even by employing to recover the debt a solicitor who has been concerned in the lunacy (*m*).

Proof of debts.

The proof of debts before the master is made either by the *vivâ voce* examination of the creditors or by affidavit.

Vivâ voce.

It is needless to say that the former is the preferable method where it is practicable, especially where there are many small debts or the estate itself is small. The mode of proceeding is thus described by Mr. Elmer. "The solicitor having the carriage of the inquiry (and who has communicated with each creditor previously) takes out a summons before the master upon the proof, and gives notice of it by letter to each creditor. The creditors attend in person at the office of the master and are sworn. They produce their bills, and the master takes down in writing the evidence as to the existence and fairness of the debt." If a committee has been appointed, his solicitor "is in attendance, and, having previously seen the bills, makes his observations upon them" (*n*).

By affidavit.

"If a debt be proved by affidavit, the creditor leaves at

(*f*) Shelf. Lun., p. 565; *Anon.*, 13 Ves. 590.

(*g*) *Stedman* v. *Hart*, Kay, 607, 612; *Re Weaver*, 2 Myl. & C. 441; *Re Ball*, 2 Moll. 145; *Brockwell* v. *Bullock*, 22 Q. B. D. 567.

(*h*) Ibid.

(*i*) *Stedman* v. *Hart*, ubi sup.; and cf. *Tayler* v. *Tayler*, 3 Mac. & G. 426.

(*k*) *Rock* v. *Cooke*, 1 De G. & S. 675.

(*l*) *Re Weaver*, 2 Myl. & Cr. 441; *Stedman* v. *Hart*, ubi sup.

(*m*) *Re Ball*, 2 Moll. 145.

(*n*) Elmer, . 35.

the masters' office the affidavit with a copy of the account annexed, showing the debt to be due, that he has no security, and that the charges are fair. He takes out a summons, which is served upon the parties appearing on the proceedings, and the creditor's right of proof is considered by the masters in the usual way. Each creditor proving in this manner is usually allowed 1*l.* 15*s.* for his costs of proof, which sum is added to the amount of his debt. And in certain special country cases the expense of a power of attorney to receive the debt and costs is also allowed" (*o*).

Costs of proof.

Extra costs occasioned by an error of the committee of the estate were in one case allowed to a creditor proving his debt against the estate, even where the original order had directed the creditor to go in and prove his debt at his own expense (*p*).

"In some cases where the small debts of the lunatic are numerous, they may be verified by the affidavit of the committee, after having been investigated by him, and the aggregate amount of such debts (no one of which may exceed 20*l.*) is permitted to be paid to him." The solicitor to the inquiry is not the proper person to distribute this money (*q*).

Alternative procedure where many small debts.

The ordinary evidence with which the master should be furnished is a copy of the list, evidence that the debt is due, that the creditor has no security, and that the charge is fair and reasonable (*r*).

Evidence of debts.

In a case in which former reports of the debts had been lost, the master was directed to receive and consider any secondary evidence of the debts; the evidence on which this is accepted should be stated in the further certificate (*s*).

Solicitor's costs must be taxed before they are allowed, though in a particular case where the solicitor had a lien on documents, possession of which was required, the committee

Solicitor's costs to be taxed.

(*o*) Elmer, p. 35, 36.
(*p*) *Re Buckle*, 1 Russ. & M. 361.
(*q*) *Re Iredale*, 1 H. & T. 254.
(*r*) Elmer, p. 35.
(*s*) *Re Iredale*, 1 H. & T. 254.

was directed to pay the costs at once, but without prejudice to subsequent taxation (*t*).

Circumstances under which the debts will be discharged.

Granting the debts shown on the state of facts or otherwise proved, the next question is, when will they be paid? The books say, where it appears that notwithstanding payment a sufficient maintenance will remain, or is securely provided for, the only ground of the court undertaking the discharge of debts, instead of leaving the creditor to his legal remedy, being the accommodation of the lunatic (*u*). "They may put him in gaol," said Lord Eldon, in one case, "where the chancellor can maintain him," but he would not allow a fund in court to be broken into for the satisfaction of creditors (*x*). In *In re Pink* (*y*), Lindley, L.J., said "The first thing to ascertain is, what is for the benefit of the lunatic, and when you have provided for that you see what you can do for the creditors." The judgment creditor of a debtor found lunatic by inquisition is entitled to an unconditional order, without reference to the lunacy jurisdiction, charging funds standing in the books of the paymaster-general of the Chancery Division to the credit of the lunatic (*z*).

Obligations morally binding.

On the other hand, when the estate is sufficient, the court will recognize obligations morally though not legally binding; as *e.g.*, where the husband of a lunatic had fulfilled a promise previously made by his wife, by giving a sum of money to her nephew, the money was allowed him in account with the lanatic's estate (*a*), and where the lunatic being a very rich man incurred a debt of honour, the court ordered the debt to be paid out of the lunatic's estate (*b*).

(*t*) *Re Davies*, 7 Jur. 589.

(*u*) *Ex parte Dikes*, 8 Ves. 79; *Ex parte McDougal*, 12 Ves. 384; *Ex parte Hastings*, 14 Ves. 182; *Ex parte Hall*, Jac. 160; *Re Adey*, 1 Coop. T. L. C. 225; *Peters* v. *Grote*, 2 Coop. T. L. C. 194; *Re Railton*, 1 Jur. 574; *Re Tayler*, 1841, Nov. 16, stated in *Tayler* v. *Tayler*, 3 Mac. & G. 427; *In re Sitwell*, W. N. 1881, p. 124; *In re Pink*, 23 Ch. D. 577.

(*x*) *Ex parte Hastings*, 14 Ves. 182.

(*y*) 23 Ch. D. 581.

(*z*) *Horne* v. *Pountain*, 23 Q. B. D. 264.

(*a*) *Re Hewson*, 21 L. J., N.S., Ch. 825.

(*b*) *In re Whitaker*, 42 Ch. D. 119.

In applications for payment of a sum of money in fulfilment of moral obligations the committee should be joined as a party (*c*).

As to what obligations incurred after lunacy are binding legally, the reader is referred to a later chapter (*d*).

Any application to the court of lunacy for payment of debts should come from the committee; the creditor has no *locus standi* (*e*).

Application for payment should come from the committee.

Formerly an order for payment of debts could be made after the death of the lunatic, on a petition presented before (*f*), though not on one presented after, his death (*g*). Now, probably the master would discontinue an inquiry as to debts on the death (*h*), though an order might be made after death on a certificate already made (*i*). When the remedy under the lunacy is gone, the creditors may pursue their ordinary remedies against the legal personal representatives of the deceased (*k*).

As to payment of debts after death of the lunatic.

(*c*) *In re Whitaker*, sup.

(*d*) Post, Bk. II. c. 1.

(*e*) *Re Townshend*, 2 De G., J. & S. 519. *In re Weld*, 20 Ch. D. at p. 462; *Brockwell* v. *Bullock*, 22 Q. B. D. 567.

(*f*) *Ex parte McDougal*, 12 Ves. 385.

(*g*) *Perkins' case*, cit. 12 Ves. 385.

(*h*) Cf. *Re Way*, 3 De G., F. & J. 175.

(*i*) *Ex parte Armstrong*, 3 B. C. C. 238; *Re Roberts*, 3 Atk. 308; *Ex parte McDougal*, 12 Ves. 384; *Re Singleton*, 8 Ir. Ch. Rep. 263; but see *Re Way*, ubi sup.

(*k*) *Wigg* v. *Tiler*, 2 Dick. 552; and cf. *Re Humpleby*, cit. ap. 2 De G., F. & J. 380.

CHAPTER IX.

OF THE APPOINTMENT OF COMMITTEES.

What are committees.

THE deputies of the crown in the care and custody of lunatics, the tutors and curators of the civil law (*a*), are with us called the committees of the person and estate respectively. Either committee may consist of one or more individuals (*b*), and the committee of the person may or may not be identical with the committee of the estate, though the latter alternative is the more common. Finally, the committee of the person is not invariably the person with whom the lunatic resides, although he is responsible for his comfort and wellbeing (*c*), and similarly the committee of the estate is not invariably the person who manages it, although he is responsible for its proper management (*d*).

Jurisdiction to appoint committees.

To the judge in lunacy in England, as to the lord chancellor in Ireland, the appointment of committees belongs, and lies in his discretion only (*e*). There is a perfect equality of jurisdiction between the courts in England and Ireland (*f*), the rule being, that the jurisdiction to appoint a committee of the person follows the residence, while that to appoint a committee of the estate follows the *locus sitûs*; in other words, where a lunatic resident in Ireland is pos-

As between the English and Irish courts of lunacy.

(*a*) The "*curatio*" of lunatics was provided for by the Laws of the XII. Tables: "*Si furiosus est agnatorum gentiliumque in eo potestas esto.*"

(*b*) See *Ex parte Ludlow*, 2 P. Wms. 635, though the practice is still perhaps in favour of joint committees.

(*c*) *Ex parte Proctor*, 1 Swanst. 531.

(*d*) *Re Brown*, 1 Mac. & G. 201; and the cases in which a receiver is appointed, post, p. 132.

(*e*) *Lady Cope's case*, 2 Ch. Cas. 239; see *Murray* v. *Frank*, 2 Dick. 555; 53 Vict. c. 5, s. 108, sub-s. (2).

(*f*) *Re B.*, 1 Ir., Eq. Rep. 181; *In re Talbot*, 20 Ch. D. 269.

sessed of Estates in England, the committee of the person is appointed by the Irish Chancellor, that of the estates by the English judge in lunacy; and the converse is of course equally true (*g*). There is no necessity that a separate commission should issue (*h*). A transcript of the record of the inquisition in the country where the inquisition was held, on being transmitted to the chancery of the other country, gives the judge in lunacy of the latter country jurisdiction for the purpose of appointing the committee (*i*). Practice.

The power of the judge in lunacy to appoint committees cannot be controlled by a testamentary devise of the custody (*k*); but it will not override a power on other grounds inherent in an individual. Thus, a father is competent to appoint a guardian to his lunatic child, until he attains the age of twenty-one years (*l*). Jurisdiction of judge in lunacy not controllable by will;

The part conceded to the next of kin of the lunatic in proposing committees has been already treated of (*m*). The utility of their assistance is so far recognized that, on all proper occasions, they are reimbursed their expenses out of the estate (*n*); although when parties opposing the proposal of those who have the carriage of the commission fail to make out a fair case, they render themselves liable for the costs occasioned by their opposition (*o*). but persons interested allowed to propose committees.

The first inquiry for the purpose of appointing committees is made by the master (*p*). The summons should state who are proposed as the committee of the person and estate respectively. The master is also furnished with evidence in support, either *vivâ voce* or by affidavit, and on this he makes his certificate. Inquiry as to committees Practice.

(*g*) *Re Newport*, 2 Myl. & Cr. 42, n.; *Re Tottenham*, 2 Myl. & Cr. 39; *Re B.*, 1 Ir. Eq. Rep. 181.

(*h*) *Re Newport*, cit. ap. Shelf. Lun., p. 170, et ubi sup.

(*i*) 53 Vict. c. 5, s. 107.

(*k*) *Ludlow's case*, 2 P. Wms. 635; *Re Booth*, 15 L. T. 429.

(*l*) *Ludlow's case*, 2 P. Wms. 635.

(*m*) Ante, p. 89.

(*n*) Ib.; and comp. *Re Bridge*, Cr. & Ph. 343 *et seq.*

(*o*) *Re Booth*, 15 L. T. 429.

(*p*) For appointments by the lord chancellor without a reference where the property was very small, see *Ex parte Pickard*, 3 V. & B. 127; *Ex parte Farrow*, 1 R. & M. 112; and cf. *Re Noble*, 2 De G., M. & G. 280.

Consent and undertaking of proposed committees.

Before, however, he approves of the committees proposed, he must receive from them an assurance, in writing, of their willingness to act, and an undertaking by the committee of the person to visit the lunatic at least once in every three months, or at such other fixed periods as may be required, and by the committee of the estate to give such security as may be required to account for the lunatic's property (*q*).

Heir and next of kin should be present at inquiry.

At the inquiry, the heir at law and next of kin should be represented. If they are not represented at the inquisition, or the parties are not prepared to proceed immediately, the master will receive evidence, and complete the inquiry at such subsequent period as may be expedient (*r*).

Petitioners, &c., not entitled to preference.

The petitioners for the commission, or those having the carriage of it, though entitled to apply for the appointment of the committees, are not necessarily entitled to any preference in respect of the appointment (*s*).

Certificate.

Objections to certificate.

On the evidence before him, the master makes his certificate, which may be objected to in the manner pointed out *ante*, p. 37 (*t*).

A *caveat* may be entered in the office of the masters against the appointment of committees, and, where this has been done, no order will be made, unless notice has been previously given to the party on whose behalf the *caveat* has been lodged, or to his solicitor (*u*). The judge has power either to vary the appointment of the master (*v*), or to refer the matter back to him to revise his certificate (*x*). But the court will not appoint a committee who has not been approved by the master (*y*).

(*q*) Elmer, p. 26.

(*r*) Ib. p. 27.

(*s*) *Re Webb*, 2 Phill. 10.

(*t*) R. L. 1890, 64; for the old practice, see *Re Bariatinski*, 1 Phill. 442; *Re Saunders*, 3 Mac. & G. 219. Preliminary objections may be taken before the masters in the usual way; ante, p. 37.

(*u*) *Re Galpine*, *Re Howell*, cit. ap. Shelf. Lun., p. 172.

(*v*) *Ex parte Le Heup*, 18 Ves. 221.

(*x*) *Ex Parte Fermor*, Jac. 405; *Re Hardy*, Shelf. Lun., p. 173.

(*y*) *In re Bruère*, 17 Ch. D. 775.

Leave to carry in proposals for committees sometimes given at the hearing of the petition.

Formerly, in some cases, where the carriage of the commission had been disputed, at the hearing of this question even, leave has been given to some one or more of the unsuccessful parties to carry in proposals for the committees. In such cases the proper order was in the form of a *caveat*, that the master be directed, in case the inquisition should be returned finding the lunacy, not to proceed to the approval of committees of the person or estate until further order (*z*).

Where no objection certificate confirmed by judge.

When there is no objection the certificate is confirmed by the judge (*a*).

Appeal against appointment.

Appeals against the appointment of a committee by the judge in lunacy were made to the Queen in council (*b*), but are now apparently governed by s. 18 of the Jud. Act, 1873.

Appointment of New Committees.

Practice.

On the death, discharge, retirement, or default in perfecting his security of a committee, a summons for a new committee is taken out before the masters (*c*). If the summons be for the committee of the estate, there must be proper evidence of what then constitutes the lunatic's property. If the application relate to the committee of the person, the last allowance and scheme for maintenance should be brought before the master; and if the last order for maintenance be of old date, the master will inquire whether any variation can be made with advantage to the lunatic. Evidence is also required of the appointment and death, or retirement, of the late committee, and, as on an original appointment, of the eligibility of the person proposed.

Masters to certify that a

No special order is required to enable the masters to

(*z*) *Re Webb*, 2 Coop. T. L. C. 155. As to bringing certificate before the judge in lunacy, see R. L. 1890, 64.

(*a*) R. L. 1890, 65, and vide ante, p. 37. See also *Re French*, L. R., 3 Ch. 317.

(*b*) *Pitt's case*, cit. 3 P. Wms. 108; *Rochfort* v. *Earl of Ely*, 1 Bro. P. C. 450.

(*c*) R. L. 1890, 80.

committee should be appointed.

prosecute their inquiries (*d*); for by r. 80 of the Rules in Lunacy, 1890, the masters are in each of the cases following, without special order, to inquire and certify whether or not it is expedient that a committee or a new committee of the person or estate should be appointed, and, if so, who is the proper person to be appointed. These cases are:—

(a.) On default of a person appointed to be committee of the estate in duly perfecting a fresh security when required by the masters;

(b.) On the death or discharge of a committee, or one of several committees where the custody does not survive;

(c.) If a receiving order in bankruptcy is made against a committee or he compounds with his creditors;

(d.) If a committee absconds or goes to reside permanently abroad.

Survival of custody.

Clause (b) of this order requires explanation. Previously to the L. R. Act, 1853, in cases where two or more persons were appointed committees, and one of them died, the grant being joint (*e*), and a mere authority without any interest, the right to the custody of the lunatic absolutely determined; and it became necessary to obtain an appointment of new committees (*f*). The only reported exception to this rule was a case where the property was very small (*g*). However, sect. 66 of the L. R. Act, 1853, provided that the grant of custody might be extended to surviving or continuing committees in certain cases. Mr. Elmer is an authority for the statement that the proceedings authorized by this section have been followed in very special cases only (*h*). S. 66 has now been repealed by the L. Act, 1890, and rule 71 of the R. L., 1890, provides that where the masters certify that several persons ought

Under L. R. Act, 1853, s. 66.

(*d*) Elmer, pp. 74, 75.

(*e*) *In re Ryder*, 37 Ch. D. 595.

(*f*) *Ex parte Lyne*, C. t. Talbot, 143.

(*g*) *Re Noble*, 2 De G., M. & G. 280.

(*h*) Elmer, p. 73.

to be appointed committees of the estate or person, and that it is expedient that one or more of such persons should continue to act after the death or discharge of the others or other of them, the order appointing the committees may direct that the custody of the estate or person shall continue to the surviving or continuing committees or committee (*i*).

Consequences of the distinctness of offices of committee of person and estate.

It should be observed that the offices of the committees of the person and estate being distinct, the above-stated rule does not apply to vacate the grant to the committee of the person on the death or discharge of any of the committees of the estate, nor, conversely, to vacate the grant of the custody of the estate on the death or discharge of any of the committees of the person. And this holds good, even though the person or persons to whom the custody in the one case is committed be included among the persons to whom the grant in the other is made (*k*).

Similarly, the committee of the estate, as such, does not appear in the proceedings for the appointment of a new committee of the person, nor does the committee of the person, as such, appear on the proceedings for the appointment of a new committee of the estate (*l*).

The preceding remarks have been confined almost exclusively to the rules and practice applicable indifferently to the committees of the person and of the estate. Other rules there are affecting these officers severally, which may therefore be more conveniently treated under their respective heads.

Provision for commitment of estate only and not of person.

It should be added that if in any case of an inquisition it shall appear that the alleged lunatic is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, it may be specially so found and certified; and every such special finding and certificate

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(*i*) R. L. 1890, 71.

(*k*) Ib. But see also *Ex parte Mount*, 21 L. J., N. S. Ch. 221, on the relation between these committees.

(*l*) Elmer, p. 75.

shall be brought before the judge in lunacy, who may make such orders as he thinks fit for the commitment of the estate of the lunatic and its management (including all proper provisions for his maintenance), but it shall not be necessary, unless in the discretion of the judge it shall appear proper so to do, to make any order as to the custody or commitment of the person (*m*).

(*m*) 53 Vict. c. 5, ss. 98, sub-s. (2), 108, sub-s. (3).

CHAPTER X.

OF THE COMMITTEE OF THE PERSON.

Who will be appointed committees of the person.

In the appointment of the officer to whose charge the person of the lunatic is committed, and on whose fidelity to his trust so much of the comfort, happiness and well-being of the lunatic depends, there are necessarily a vast number of circumstances demanding the consideration of the person with whom the appointment lies. Among these, however, a few principal rules of guidance stand prominently forward. Thus—

Person within the jurisdiction.

1. The committee of the person must be resident within the jurisdiction and under the control of the judge in lunacy (*a*).

Husband or wife.

2. Where the lunatic is married, the personal custody will be granted to the husband or wife, as the case may be (*b*).

This rule applies almost invariably where it is the wife who is lunatic, and the reason must be very strong which will altogether exclude a wife from the charge of her lunatic husband. Even where a wife has been committed for contempt of court in not producing her husband before the commissioners under a commission of lunacy, the custody of his person was granted to her on her being discharged from her commitment (*c*). Where the circum-

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(*a*) *Re Tottenham*, 2 Myl. & Cr. 39; *Re B.*, 1 Ir. Eq. Rep. 181; *Ex parte Ord*, Jac. 94; *In re Bruère*, 17 Ch. D. 775.

(*b*) *Lord Wenman's case*, 1 P. Wms. 701; *Ex parte Le Heup*, 18 Ves. 221; *Edwards* v. *Abrey*, 2 Coop. T. L. C. 185; *Re Dyce Sombre*, 8 Jur. 817. By the French Code *Le mari est de droit le tuteur de sa femme interdite* (C. C. 506); *la femme pourra être nommée tutrice de son mari.* (C. C. 507.)

(*c*) *Lord Wenman's case*, 1 P. Wms. 701.

stances render it desirable, there may be a joint appointment of the wife and another (*d*).

Next of kin.

3. Where the lunatic is unmarried, the custody of his person is usually committed to one or more of the next of kin, other for the most part than the heir at law (*e*). The existence of family differences in the past, unless involving a serious issue, will not disqualify a relation for the post, even though some dislike of him may, in consequence, still remain in the mind of the lunatic (*f*).

A special rule, stigmatized by Lord Macclesfield as the offspring of barbarous times, and the effect of a cruel presumption, for some time absolutely excluded the heir at law from the position of the committee of the person, upon the ground that it was for his interest that the lunatic should die (*g*). If the rule is regarded in the present day, it is rather because of the convenience afforded in practice by the recognition of an established settlement of the conflicting claims of heir at law and next of kin, than of any serious confidence in the alleged grounds for its original adoption.

Consanguinity gives no right.

4. The claims of consanguinity create no right with regard to the appointment of the committee of the person (*h*).

Thus, the design of making a profit out of the office will disqualify a kinsman otherwise eligible (*i*); and the incapacity of the nearest relations, as, for example, from indigency, will constitute a good ground in some cases for

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(*d*) See *Ex parte Le Heup*, 18 Ves. 221.

(*e*) *Dormer's case*, 2 P. Wms. 262; *Neal's case*, 2 P. Wms. 544; *Ex parte Ludlow*, 2 P. Wms. 638; *Ex parte Cockayne*, 7 Ves. 590 *a*; *Ex parte Le Heup*, 18 Ves. 227; *Re Watkins*, 1 Coop. T. L. C. 225; *Re Booth*, 15 L. T. 429.

(*f*) Per Eldon, C., in *Ex parte Le Heup*, ubi sup.

(*g*) *Dormer's case*, 2 P. Wms. 262; Shelf. Lun., pp. 164, 165; Elmer, p. 28.

(*h*) *Lady Cope's case*, 2 Ch. Cas. 239, 277; *Neal's case*, 2 P. Wms. 544; *Re Jones*, cit. ap. Shelf. Lun. 178.

(*i*) *Ex parte Fletcher*, 6 Ves. 427.

appointing a stranger as the committee (*k*). Where a stranger in blood is appointed committee of the person, an order is sometimes made that the family shall have access to the lunatic (*l*).

A person of the same sex.

5. Subject to the preceding rules, a person of the same sex as the lunatic is preferred (*m*).

A person agreeable to the lunatic.

6. The court will attend, as far as possible, to the feelings, wishes, and inclinations of the lunatic (*n*); in some cases even where the prejudices of the lunatic have been absolutely unfounded (*o*). Where the object of the prejudice would be a suitable committee in other respects, a compromise may be effected, either by appointing more than one committee (*p*), or by directing that the immediate care of the lunatic shall be with some other person than the committee, though under his constant surveillance (*q*). Similarly, the wishes of the lunatic's family have some weight (*r*).

A person residing near the lunatic.

7. Finally, although this rule has become rather one of guidance than of necessity, since the masters have required from the committee of the person an undertaking from time to time to visit the lunatic, the neighbourhood of the residence of the proposed committee to the proposed residence of the lunatic will be taken into consideration (*s*).

Where the proposed committee is a feme covert.

Where the proposed committee is a feme covert, it is usual to join her husband with her in the office (*t*). It is said, however, that the custody may be granted to her

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(*k*) In *Re Jones*, ubi sup., the rector of the parish and two other inhabitants were appointed joint committees.

(*l*) *Re Aghrim*, 1 Coll. Lun. 229.

(*m*) *Ex parte Ludlow*, 2 P. Wms. 638.

(*n*) *Re Leacocke*, Ll. & G. t. P. 498; *Ex parte Fletcher*, 6 Ves. 427; *Re Dyce Sombre*, 8 Jur. 817.

(*o*) *Ex parte Fletcher*, 6 Ves. 427.

(*p*) *Ex parte Le Heup*, 18 Ves. 221; *Re Dyce Sombre*, *ubi sup.*

(*q*) *Re Cumming*, 1 De G., M. & G. 561.

(*r*) *Re Bangor*, 2 Moll. 518; *Ex parte Le Heup*, 18 Ves. 227.

(*s*) *Ex parte Fermor*, Jac. Rep. 405.

(*t*) *Ex parte Kingsmill*, 3 P. Wms. 111, n.; *Ex parte Lyne*, C. t. Talbot, 143; *Ex parte Mildmay*, 3 Ves. 2.

alone (*u*); and in a case where the appointee was a married woman living apart from her husband, the allowance for maintenance was ordered to be paid to her on her separate receipt, her solicitor undertaking that the money should be properly applied (*x*).

Grant, how made.

The custody of the lunatic is committed to the committee by the grant, or order of the judge operating as a grant (*y*). It is not necessary, even where the parties in whose charge the lunatic is at the time have secreted him, that a *habeas corpus* should issue for his production; an order for his delivery to the committee is sufficient, and disobedience will be followed by committal (*z*). The order appointing the committee of the person takes effect immediately (*a*).

No security usually required.

No security is ordinarily required of the committee of the person, though where he retains any furniture or effects of the lunatic he signs an inventory and undertaking to deliver up the same when required so to do, which are deposited in the masters' office (*b*).

Of the Duties of the Committee of the Person.

Personal care.

These relate to the personal care of the lunatic, and, in the absence of express direction by the court, imply the duties of fixing his residence, selecting his attendants, regulating his establishment, and making all other provisions for his maintenance, support, and comfort. In the performance of these duties the committee has regard to the allowance made for the lunatic's maintenance, for which the

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(*u*) Per Parker, C., ap. 3 P. Wms. 111, n.

(*x*) *Re Edwards*, 2 Mac. & G. 134.

(*y*) 53 Vict. c. 5, s. 108, sub-s. (2); Elmer, p. 113.

(*z*) *Ex parte Cranmer*, 12 Ves. 456. Of course the judge cannot order the delivery up to the committee of a lunatic confined during the Queen's pleasure. *Ex parte Hill*, Coop. 54; *Re Pearce*, 8 Jur. 89. For a form of order where a lunatic had completed his time of imprisonment, see *Re M'Dermott*, 3 Dr. & W. 480.

(*a*) 53 Vict. c. 5, s. 108, sub-s. (2).

(*b*) R. L. 1890, 120.

reader is referred to a later chapter (*c*). At the preliminary inquiry, and from time to time during the continuance of the lunacy, a scheme or plan of maintenance is settled and re-settled by the master, and this also must enter materially into the consideration of the arrangements to be adopted for the benefit of the lunatic. In order to insure the performance of his duties as far as possible, the committee is required, pursuant to an undertaking given by him on his appointment, to visit the lunatic at certain intervals, fixed by the judge in lunacy. In ordinary cases the lunatic is required to be visited once in every three months (*d*). The court has the power of remitting the frequency of the visits in proper cases.

Plan settled by master.

Visitation of lunatic by committee.

The primary points for the consideration of the committee are the health and comfort of the lunatic, and, of course, where the possibility exists, his recovery. The provision of proper medical advice is therefore a paramount point, together with such means of recreation, change of air and scene, exercise and society, as the amount of his income and the character of his disorder allow.

Other duties of the committee of the person.

The committee is required, with the concurrence of the medical attendant, to make half-yearly an accurate report of the state of mind and bodily health of the lunatic, and, in particular, to report specially from time to time any important change occurring in either.

Nor is this the only security for the welfare of the lunatic. The chancery visitors of lunatics are themselves required to visit and report on the care and treatment of lunatics, so found by inquisition. Every lunatic who is in a private house is to be so visited during the two years next following inquisition at least four times in every year; those who are not so confined are visited twice in the year (*e*).

Control of the chancery visitors over the committee.

Previous to making these visits the visitors are furnished with a statement of the income of the lunatic, and the

(*c*) Post, p. 146.
(*d*) Elmer, p. 27.
(*e*) 53 Vict. c. 5, ss. 183; *In re X.*, 45 L. T. N. S. 97.

allowance for and scheme of his maintenance (*f*). In these respects they consider how far the accommodation provided appears to be adequate to the sum allowed for this purpose, and whether the lunatic is maintained in a suitable and proper manner; whether he has the comforts which his malady and income admit of, and whether any addition should be made to his comforts, or any alteration should be introduced in the scheme for his maintenance (*g*).

Their reports.

The visitors' report is considered by the board, and, where necessary, referred to the masters. They commonly summon the committee before them for explanation or advice (*h*).

The visitors once in every year report to the lord chancellor in the case of each lunatic, stating the result of their examination and inquiry as to maintenance, and in any case in which any special report has been made, state, as far as possible, what steps have been taken in consequence of such special report (*i*).

In any case, moreover, the committee may, where he thinks an alteration in the existing scheme expedient, make an application in the masters' office to that effect (*k*).

Residence of the lunatic.

In the absence of express direction or prohibition, when express leave must be first obtained, the committee may fix and vary the lunatic's residence at pleasure, and may when he deems it expedient even confine him in an asylum (*l*).

When permitted to be out of the jurisdiction.

He is not, however, permitted to remove the lunatic out of the jurisdiction (*m*), except where special circumstances make a residence out of the jurisdiction highly desirable, as, *e.g.*, where the lunatic will so be brought into the neighbourhood and society of a number of relations, or where change of air and scene has been recommended by his

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(*f*) R. L. 1890, 101.
(*g*) Ib. 102, 103.
(*h*) Ib. 104, 105.
(*i*) Ib. 106.
(*k*) Ib. 31, *ante*, p. 34.
(*l*) See 53 Vict. c. 5, s. 12.
(*m*) *Re Jones*, 1 Phill. 461.

medical man (*n*). In such cases security for the return of the lunatic, to be approved of by the master, must be previously given by the committee (*o*), and must be such as admits of being enforced in our own courts (*p*). For such a purpose the Scotch courts are foreign (*q*). Moreover, the area of absence is sometimes limited, as for example, to the United Kingdom (*r*).

Notice of change of residence to be given.

On any change of residence of the lunatic, whether for a long or short period, the committee must give immediate notice thereof to the board of visitors, in order that they may be at all times enabled to visit him. When, on making their visits, they are unable to discover the then residence of, or are, by any other circumstance, prevented from actually seeing, on that occasion, the lunatic whom they intended to visit, the visitors are bound to make a special report to the lord chancellor (*s*).

The committee must also give due information to the visitors as to his own abode, and the name and residence of the medical attendant on the lunatic (*t*).

Confinement of the lunatic on the committee's order.

An order, signed by the committee of the person, and having annexed thereto an office copy of the order appointing him, is a sufficient authority for the reception of the lunatic into an institution for lunatics or as a single patient; if no committee has been appointed an order signed by a master is sufficient (*u*).

The provisions of s. 44 of the L. Act, 1890, as to the medical visitation of single patients every two weeks, do not apply to patients found lunatic by inquisition (*x*).

Mode of obtaining access, &c.,

When the lunatic is once committed to the care of the committee, he has, in all cases, a general discretion as to

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(*n*) Ib., and *Re Stair*, 1 Coop. T. L. C. 227; *Re Hackett*, 3 Ir. Ch. Rep. 375.

(*o*) *Re Stair*, 1 Coop. T. L. C. 227; *Re Jones*, 1 Phill. 461.

(*p*) *Re Stair*, 1 Coop. T. L. C. 227.

(*q*) Ib.

(*r*) *Re Hackett*, 3 Ir. Ch. Rep. 375.

(*s*) 53 Vict. c. 5, s. 185, sub-s. (2).

(*t*) Elmer, p. 117.

(*u*) 53 Vict. c. 5, s. 12.

(*x*) 53 Vict. c. 5, s. 44, sub-s. (5).

to lunatic under the charge of the committee.

his treatment. If there be good reason to complain of his conduct in the execution of his trust, he may be removed (*y*). It sometimes happens, however, that it is desired to alter some particular arrangement made by him, without taking so important a step; for example, some person to whom access to the lunatic has been refused by the committee may desire to obtain permission to visit him. The proper course for the applicant in such a case is to apply by summons to the judge in lunacy that the committee may be ordered to allow the applicant to have access, &c. It should be remarked, however, that the court will not grant this without it is shown to be clearly for the good of the lunatic (*z*).

Committee's discretion not interfered with, except for the clear good of the lunatic.

It is needless to add that the lunatic should be protected from those who would marry him in spite of his lunacy, or procure the execution by him of any instrument or will during the continuance of actual insanity.

Committee not usually entitled to remuneration,

but sometimes to money out of pocket.

The committee of the person is not entitled to any remuneration for his care and trouble in protecting the lunatic; but it seems that, in proper cases, his actual expenses out of pocket will be allowed him, even when he has to account for his expenditure. In some cases, indeed, an annual sum has been directed to be paid to the committee for expenses incurred by him in visiting the lunatic (*a*). The allowance will, however, be at once stopped if the committee retires out of the jurisdiction, where the court cannot compel him to do his duty (*b*).

For the accountability of the committee of the person, in respect of the allowance for maintenance and his interest, if any, therein, the reader is referred to a later page (*c*).

(*y*) Post, p. 142.

(*z*) *Ex parte Lyttleton*, 6 Ves. 7; so in *Rex* v. *Clarke*, 3 Burr. 1363, the court refused to grant liberty of access to and inspection of a lunatic where the application came from a party who had no pretence for demanding it.

(*a*) *Ex parte Ord*, Jac. Rep. 94.

(*b*) Ib. *In re Bruère*, 17 Ch. D. 775.

(*c*) Post, p. 155, *et seq.*

CHAPTER XI.

OF THE COMMITTEE OF THE ESTATE.

SECT. 1.—*Appointment of the Committee.*

Who will be appointed.

THE following principles are tolerably well recognized in the appointment of the committee of the estate :—

The person presumptively entitled to the land.

1. The person presumptively entitled to the land (if any) is preferred as the committee of the estate (*a*) : and for this purpose, there is no distinction between an heir at law and a remainderman,—at least, where the lunatic is advanced in years and his recovery all but hopeless (*b*).

Relations.

2. As between the kin of the lunatic and strangers, the former are here also preferred (*c*). The rule, however, is not without exception: in one case a neighbouring gentleman, whose position rendered it probable that he would manage the property to advantage, was chosen (*d*).

Persons residing near the land.

3. Although, again, it is considered desirable where the course is practicable, as in the case just cited, that the committee of the estate should reside in the neighbourhood of the landed property (*e*) ; and in another case where a lunatic had two estates, both of great value, one in Warwickshire consisting partly

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(*a*) 1 Bl. Comm. 294 ; *Re Bangor*, 2 Moll. 518 ; *Re Watkins*, 1 Coop. T. L. C. 225 : but this would not give a person entitled under the will of the lunatic, made during his sanity, a claim to the post.

(*b*) *Re Webb*, 2 Ph. 532.

(*c*) *Ex parte Le Heup*, 18 Ves. 227 ; *Re Watkins*, 1 Coop. T. L. C. 225.

(*d*) *Neal's case*, 2 P. Wms. 544.

(*e*) *Re Miles*, Shelf. Lun. 169 : *Neal's case, ubi sup.* ; *Re Brown*, 1 Mac. & G. 201.

of coal mines, and the other in London and Middlesex chiefly composed of houses and other leasehold property, with a rental of more than 3,000*l.* per annum, the court appointed a separate committee for each estate (*f*); yet residence at a distance is not, taken by itself, an absolute bar to the appointment (*g*). Furthermore, where there are good reasons for selecting one against whom the objection in question exists, a receiver may be appointed (*h*), or the committee may employ an agent to superintend the management of the estate (*i*). Finally, it is possible that, with the modern facilities for rapid locomotion, the objection to distant residence has lost much of its importance.

Who will not be appointed.

Persons filling certain definite positions are by the policy of the law pointed out as improper nominees for the office of committee of the estate. To this class belong particularly the solicitor who has the charge of the proceedings in lunacy (*k*), and the masters of the court (*l*). A similar difficulty has been felt in appointing as committee a person already liable to account to the lunatic's estate, though a person in that position has been appointed where no other suitable committee could be found (*m*). *A fortiori* of course a person whose conduct has been improper will not be appointed (*n*).

It should be observed that two or more particular individuals may with propriety be appointed joint committees of the estate without its necessarily following that either of them could be properly entrusted alone (*o*).

(*f*) *Re Robins*, 2 Russ. & Myl. 449.

(*g*) *Re Brown, ubi sup.*

(*h*) *Re Seaman*, Shelf. Lun., p. 187.

(*i*) *Re Brown, ubi sup.*

(*k*) *Ex parte Pincke*, 2 Mer. 452.

(*l*) *Ex parte Fletcher*, 6 Ves. 427; *Re Lanesborough*, Ll. & G. t. Pl. 504; *Re Doolan*, 3 Dr. & W. 445; *Re Hussey*, 1 Moll. 226.

(*m*) *Re Millington*, 2 Eq. Rep. 158.

(*n*) *Ex parte Philips*, 3 Mod. 357, per Hardwicke, C.

(*o*) *Re Noble*, 2 De G., M. & G. 280.

Where it is ordered that a person named be appointed committee of the estate, the order is to be deemed to take effect only on the masters certifying that he has given such security as they have approved of (*p*). The security is to be perfected at or within such time as the masters may appoint, and until then the approved committee may not interfere in any manner in the affairs of the lunatic as the committee of his estate or otherwise (*q*). All orders for the appointment of committees take effect until further order only (*r*).

Order appointing a committee of the estate takes effect from when,

and till when.

The judge may order the commitment of the estate without the commitment of the person when it has been specially found or certified that the lunatic is not dangerous and capable of managing himself, but not his affairs (*s*).

Sect. 2.—*The Committee of the Estate not usually remunerated.*

As a general rule the committee of the estate is not entitled to remuneration either for his own services or for those of other persons employed by him to perform duties which might properly be performed by himself (*t*). Where an exception is made, it will be not for the sake of the committee, but for that of the estate, and in no case is it made willingly (*u*).

General rule.

In order that any allowance may be made, it must ordinarily be shown, (1) that the management of the estate is troublesome, the estate, *e.g.*, consisting of landed pro-

Grounds for departing from it.

(*p*) 53 Vict. c. 5, s. 108, sub-s. (2), R. L. 1890, 117.

(*q*) R. L. 1890, 117.

(*r*) Ib. 116.

(*s*) 53 Vict. c. 5, s. 108, sub-s. (3).

(*t*) *Re Annesley*, Ambr. 78; *Anon.*, 10 Ves. 103; *Re Lanesborough*, Ll. & G, t. Pl. 503, 508; *Ex parte Fermor*, Jac. 404, 406; *Powell* v. *Bonner*, 9 L. J., N. S., Ch. 139; *Re Walker*, 2 Ph. 630; *Re Westbroke*, ib. 631.

(*u*) *Ex parte Fermor, ubi sup.*; *Re Walker, ubi sup.*; *Re Westbroke, ubi sup.*; *In re Weld*, 20 Ch. D. 451.

perty situate in divers parts of the country, or being divided up into small holdings, or involving particular supervision (*x*). Where a lunatic's property consists simply of public stock or any moneys periodically receivable and not requiring an expenditure of labour and time, the allowance will be of course refused (*y*); and (2) that no fit and proper person can be found who will undertake to perform the duties gratuitously (*z*); and herein it seems that the court will accede more graciously to the application for an allowance where the applicant is one who has consented to act at the request of the friends of the lunatic, on the understanding that he would be held harmless, than where he has accepted the office without any stipulation (*a*).

Alternative methods in lieu of remunerating the committee.

Even where these conditions are fulfilled, a direct allowance for care and trouble is very seldom made. The first resource is to allow moneys actually expended either in the employment of an agent for the more thorough management and realization of the estate (*b*), or personally in the collection of the rents (*c*); or, secondly, a receiver is appointed at a salary either fixed or regulated by percentage on receipts (*d*); or, thirdly, a sort of compromise is effected and a receiver appointed with a salary, but

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(*x*) In *Re Annesley*, *ubi sup.*, the property was large and dispersed in England and Ireland; in *Ex parte Fermor*, *ubi sup.*, the duty would be troublesome; and cf. *Re Errington*, 2 Russ. 567, where the size and character of the estate appears; in *Re Walker* and *Re Westbroke*, the tenements were numerous and scattered; in *Re Brown*, 1 Mac. & G. 201; the property was large.

(*y*) *Powell* v. *Bonner*, 9 L. J., N. S., Ch. 139.

(*z*) *Re Palmer*, Shelf. Lun. 228, 229; *Re Walker*, 2 Ph. 630; and cf. *Re Smith*, Shelf. Lun. 230.

(*a*) *Ex parte Fermor*, Jac. 404; *Re Palmer*, *ubi sup.*; *Re Walker*, 2 Ph. 630; *Re Westbroke*, 2 Ph. 631. *A fortiori* is the court more reluctant where the committee is nearly related to the lunatic. *Re Annesley*, Amb. 78.

(*b*) *Re Errington*, 2 Russ. 567; and cf. *Re Brown*, 1 Mac. & G. 201.

(*c*) *Ex parte Fermor*, *ubi sup.*; *Re Errington*, *ubi sup.* In *Re Westbroke*, the allowance was of the expenses of collecting, *i.e.*, money actually expended, not exceeding 5*l.* per cent. on receipts.

(*d*) See the chapter on the Receiver, post, p. 132.

required to give the same security as is ordinarily demanded of a committee (*e*). In an old case before Lord Hardwicke remuneration was granted by increasing the allowance for maintenance, the committee in that case being also the committee of the person (*f*). In *Re Lanesborough* an attempt to follow this precedent was frustrated (*g*). The consent of the next of kin to the application does not ensure its success, for they have no present interest, and may have no future interest in the estate (*h*).

The court will not infrequently make a large allowance, without liability to account, to the committee of the estate being also a near relative of the lunatic for a given and definite purpose, *e.g.*, for keeping up the lunatic's house and its surroundings in a suitable manner. The court will not scrutinize too closely the items of the expenditure, as to some extent the benefit of the committee himself is contemplated, but at the same time it will see that the allowance on the whole is devoted to the objects intended, and will not permit its application to other objects. The committee has no legal or equitable right which he can enforce to the allowance thus given—he cannot, therefore, either sue for or mortgage it (*i*).

Sect. 3.—*Of the Security required of the Committee of the Estate.*

As to the Security generally.

Security almost invariably required.

From the first, the grant to the committee of a lunatic's estate has been always a grant liable to an account, and the committee has been required to give security to render

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(*e*) *Ex parte Warren*, 10 Ves. 622; *Ex parte Radcliffe*, 1 Jac. & W. 639.

(*f*) *Ex parte Annesley*, Amb. 78. *In re Weld*, 20 Ch. D. 451.

(*g*) Ll. & G. t. Pl. 503.

(*h*) *Ex parte Annesley*, *ubi sup.*

(*i*) *In re Weld*, 20 Ch. D. 451.

this account from time to time as he may be directed (*k*). In some early cases, indeed, security has been altogether dispensed with, the property being very small or capable of being brought into court (*l*); in modern times, though a committee has in a single instance been permitted to receive certain weekly rents of a small property before perfecting his security on his undertaking to perfect it within six weeks (*m*), yet ordinarily a committee will not be allowed to meddle with the estate until his security is complete (*n*).

The perfecting of the security.

The security, therefore, should ordinarily be perfected immediately on the order for the appointment being made. Should the approved committee make default, application should be made to the masters on the subject, and, if necessary, a summons to fix the time, within which the security shall be completed, should be taken and served in the usual way. The period limited is usually three weeks or a month (*o*).

Practice where the security is not duly perfected.

If the security is not perfected within the time so limited, the masters, without further order, proceed to a fresh inquiry into the fitness of some other person for the office, and the process is repeated until some suitable person or persons perfect security to their approval (*p*).

Time for perfecting security extended.

Under special circumstances, however, the period originally limited for the purpose of perfecting the security may be extended (*q*). In order to obtain the extension the solicitor who has the charge of the proceedings must, before the expiration of the limited period, apply at the office of the masters in lunacy for a summons to fix a fresh period within which the security is to be completed, and this must be served upon the persons entitled to apply for the

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(*k*) 17 Edw. 2, c. 10; *Re Fitzgerald*, 2 Sch. & Lef. 436; *Wellesley* v. *Wellesley*, 2 Bligh, N. S. 129; *Re Frank*, 2 Russ. 450.

(*l*) *Re Burroughs*, 1 Con. & L. 309.

(*m*) *Re Rutter*, 22 L. J., N. S., Ch. 178.

(*n*) R. L. 1890, 117.

(*o*) Elmer, p. 51. The allowance of time at all is an act of grace, and due diligence on the part of the committee must be shown.

(*p*) R. L. 1890, 80.

(*q*) Shelf. Lun., p. 194, and the cases there cited; Elmer, *ubi sup.*

committee, or their solicitors, in the usual manner. On the return of the summons, if satisfactory reasons are shown for the enlargement and the master is assured that the committee approved of is really proceeding to complete the security, the time is enlarged by him as the circumstances may require (*r*).

Cases in which time has been extended.

Under the practice, before the L. R. Act, 1853, this privilege was granted where the absence from England of the approved committee, or of one of his proposed sureties, occasioned the delay (*s*); where the security required was very large, and it was extremely desirable that a particular surety should be obtained (*t*); where circumstances occurred occasioning an alteration in the amount of the security required (*u*); and where the approved committee had omitted to complete the security through inadvertence (*x*).

Amount of security settled formerly by attorney-general, now by the masters.

Before 1853 it was the duty of the attorney-general on behalf of the crown to settle the amount of the security, to approve of the sureties, and to see that the bonds were properly executed; and the bond was entered into with him (*y*). Under the Rules in Lunacy, 1890, the masters in lunacy are to approve the security, the bond, where the security is by bond, being expressed to be given to them jointly (*z*).

Form of the Security.

Bond.

This security of the committee of the estate was, under the old practice, universally given in the form of a joint and several bond in favour of the crown, entered into by the committee and two sureties at the least, and this is still a not uncommon mode of offering it (*a*). By the R. L. 1890, another form of security is introduced, which,

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(*r*) Shelf. Lun., *ubi sup.*

(*s*) *Re Clare, Re De l'Isle*, cit. Shelf. Lun., *ubi sup.*

(*t*) *Re Clare, ubi sup.*

(*u*) *Re Jones*, Ib.

(*x*) *Re Arrowsmith*, Ib.

(*y*) *Re Bull*, 2 Coop. T. L. C. 63 73.

(*z*) R. L. 1890, 72; see Elmer, pp. 47, 168, 169.

(*a*) *Re Bull*, 2 Coop. T. L. C. 63 *et seq.*; Shelf. on Lunacy, pp. 191 *et seq.*

in the cases where it is adopted, renders the bond altogether unnecessary. This consists in the committee, by the direction and permission of the masters, bringing into court an adequate sum of money or stock. The masters may for that purpose, by certificate, give liberty for payment or transfer into court of any money or stock, and direct how the money is to be invested and the dividends applied, and the paymaster-general shall give effect to every such certificate (*b*). The powers given to the lord chancellors of England and Ireland respectively by the National Debt (Conversion) Act, 1888, to make regulations extend to committees' security accounts (*c*).

Bringing money or stock into court.

The Amount of the Security Required.

Where security by bond.

Where the security is offered by bond the penalty is usually determined in the following manner: If the property consists of freehold, copyhold or leasehold estate or of a fund in court, the dividends whereof can be received by the committee, the penalty is fixed at double the amount of the annual income, if the income amounts to 250*l.* per annum or more; and at treble the amount of the annual income, if the income falls short of that amount: if the property consists of pure personalty, other than a fund in court, the penalty is fixed at double the amount or value of the personal estate which the committee may be in a situation as committee to receive: if the property consists partly of realty, leasehold property, or a fund in court, and partly of personalty, other than a fund in court, the penalty is fixed at a compound sum consisting of a sum equal to double or treble the annual income from the realty, leaseholds, or funds in court, according as this amounts to or falls short of the sum of 250*l.* per annum, together with a sum equal to double the amount or value of the personalty other than the fund in court which the

(*b*) R. L. 1890, 73.

(*c*) 51 Vict. c. 2, s. 24.

committee may be in a situation as committee to receive (*d*).

When the committee pays money or transfers stock into court under the R. L., the amount so paid or transferred must be adequate to the security which would have been created if the security had been in the ordinary manner by bond (*e*).

Where money or stock brought into court.

In the calculation of the amount of the security reversionary property is included among the property of the lunatic, unless by written notice given to trustees or others it can be arranged that the property shall not be dealt with by the committee, except under the special order of the judge in lunacy (*f*).

Where reversionary property of the lunatic.

Of course, it is to the interest of the committee, where the lunatic's estate consists wholly or in part of personalty other than a fund in court, to get as much of it as possible out of his own disposition, especially in respect of the principal. This the legislature has given him great facilities for doing. Almost every kind of stock, whether in the public funds or in any railway or other company, provided that it is transferable in books, can under the L. Act, 1890, and rules, be taken into court under the certificate of the master and without special order (*g*).

Diminution of the amount of security required by bringing property of the lunatic into court.

Independently of the act, the security may be further reduced by depositing in the masters' office any securities belonging to the lunatic, as mortgage deeds, shares, bonds, bills, notes or policies of life insurance, so as to deprive the committee of the power to receive the amounts secured (*h*). In all such cases the committee will be required to give security in respect of the income only (*i*).

Depositing securities, &c.

If there should happen to be no property but what is in court, and the allowance for maintenance be ordered to be

Further reduction of security.

(*d*) Elmer, p. 47.

(*e*) R. L. 1890, 73.

(*f*) Elmer, p. 48.

(*g*) 53 Vict. c. 5, s. 341; R. L. 1890, 44; and conf. *Re Ives*, 32 L. J., N. S., Ch. 673; *In re Mitchell*, 17 Ch. D. 515. Where the fund is already in court under the Trustee Relief Act, see *Re Young*, 5 W. R. 400.

(*h*) *Re Eagle*, 2 Phill. 201; and post, p. 128; R. L. 1890, 44.

(*i*) Elmer, p. 48.

paid by the paymaster-general to the committee of the person as such, without passing through the hands of the committee of the estate, his security will be reduced by that amount (*k*); while, if it be so arranged that he receives nothing, as when the whole income is paid for maintenance (*l*), or a receiver is appointed and the committee is restrained from receiving the rents (*m*), the security required of him is merely nominal, namely, for 100*l*. This order, however, will be made only in very special cases.

When nominal security only.

No security given by committee of estate in respect of furniture intrusted to committee of person.

Finally, the committee of the estate gives no security for the value of the household furniture and effects of the lunatic, which are allowed to be used by the committee of the person for the convenience and comfort of the lunatic, and for which, as has been seen, the committee of the person is responsible (*n*).

Change of the Security.

Reduction of security.

Should the outstanding estate of the lunatic be reduced after the committee has completed his security, either by payment or transfer into court of funds belonging to the lunatic or otherwise, the original bond, if the security shall have been by bond, may, on the application of the committee, be given up, or part of the fund in court paid out or retransferred, and security for a less amount may be taken (*o*). Conversely, when the property of the lunatic is increased, the masters may require that the security be increased (*p*); nay, if he choose so to do, the committee may himself apply to have his first bond delivered up and to change the security by giving a greater (*q*). This, however, though presenting the appearance of being intended

Increase of security.

(*k*) *Ex parte Mount*, 21 L. J., N. S., Ch. 221.

(*l*) Vide post, pp. 146 *et seq.*

(*m*) *Re Billinghurst*, Ambl. 104; *Radclyffe* v. *Carter*, C. P. Coop. 253; post, p. 140.

(*n*) Elmer, p. 48.

(*o*) R. L. 1890, 72; and conf. *Ex parte Northleigh*, 2 Ves. 673; *Re Palmer*, cit. ap. Shelf. on Lunacy, pp. 195, 196.

(*p*) R. L. 1890, 72.

(*q*) *Re Pereria*, 2 Ves. 673.

for the benefit of the lunatic's estate, will not be granted without strict examination, lest the specious proposal should cover or afford the means of effecting a fraud. For if, for example, when the former bond was given up, no account had been rendered of part of the profits, there could be no remedy but from the time when the latter bond was taken (*r*).

Effect of non-compliance with call to increase security.

When the masters require the security of the committee of the estate to be increased, default in perfecting the larger security will carry with it the same incidents as a default in perfecting the original security; and on the expiration of the period limited for the purpose, unless the time has been enlarged, the masters will, without order, proceed to the inquiry what other person or persons will be fit and suitable for the office (*s*).

Substitution of security by payment into court for security by bond.

It is scarcely necessary to point out that where security has originally been given by bond, it may subsequently be discharged on the committee paying or transferring into court under the act a sufficient fund for the same purpose (*t*). But if the accounts of the committee have not been very recently passed, it may be necessary, before the security can be discharged, to pass the account to a day immediately antecedent to the discharge, to be fixed by the master (*u*).

On marriage of female committee.

Where the committee of the estate is a woman, and she marries subsequently to her appointment, the judge in lunacy, before making any further order which the change in her condition may render necessary, requires to be satisfied as to the respectability of the husband (*x*).

The Sureties to the Bond.

How many required.

Two sureties are in all ordinary cases required where the security of the committee is by bond; and more are not allowed, unless, *first*, there be several committees, and the

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(*r*) Ibid., per Hardwicke, L. C.
(*s*) R. L. 1890, 80.
(*t*) Ib. 73, 74, 82.
(*u*) Elmer, p. 55; and conf. *Re Pereria*, 2 Ves. 673.
(*x*) Elmer, p. 51.

same sureties will not be bound for all; or *secondly*, the penalty is very large in amount. In the former case each surety becomes bound in the whole penalty; in the latter each is bound by several bonds in so much as that the penalties of all the sureties together amount to the whole penalty required. In this case each surety justifies in the amount in which he is bound; in other cases the sureties justify in such sums, not very disproportionate to one another, as they may agree upon, the amount of the penalty being made up between them (*y*).

Who may be.

With but few exceptions, any person of respectable character and adequate means will be accepted as a surety (*z*). Some hesitation would probably be felt in admitting the partners or partner in trade of the committee, or persons in partnership together; and probably, on the analogy of the solicitor in a suit, the solicitor to the commission would be rejected also. A surety, unless, indeed, he be on duty in her Majesty's army or navy or at an embassy, must, it is opined, be resident in England or Wales, whether the property of the lunatic is here or not (*a*).

Committee of person not generally accepted as surety for committee of estate.

It seems that, save in exceptional cases, the committee of the person will not be accepted as a security for the committee of the estate (*b*).

Sureties rarely dispensed with.

Sureties for the committee of the estate, where his security is by bond, can only be dispensed with under the express order of the court; and it is an order which can only be obtained under very special circumstances (*c*).

Masters to be satisfied that the sureties are living.

By the Rules of 1890, it is provided that every committee of the estate shall, on each occasion of passing his accounts, or whenever the masters so require, satisfy the masters that his sureties are living, and that neither of them has been adjudicated bankrupt or compounded with his creditors. In default of the committee so doing, the masters

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(*y*) Elmer, p. 49.

(*z*) Conf. Kerr on Receivers, pp. 112 *et seq.*, Dan. Ch. Pr. 1687.

(*a*) *Cockburn* v. *Raphael*, 2 Sim. & St. 453.

(*b*) *Ex parte Mount*, 21 L. J., N. S., Ch. 221.

(*c*) Elmer, p. 49, and conf. ante, pp. 117, 118.

are to require him to enter into fresh security, within such time as they shall fix (*d*).

Responsibility of sureties.

While on the special subject of sureties, it may be desirable to point out that the office requires those who hold it to ascertain that the committee discharges his duties with regularity, and that if they neglect to do so, or trust to the court, the sureties must take the consequences of the committee's misconduct or disobedience (*e*). In one case (*f*) the sureties were held liable on the default of the committee, not only for the balance reported due from him on his accounts, but also for the costs of proceedings subsequently taken against him for the purpose of enforcing payment of the balance; and this although the sureties had no notice of the default of their principal until after the proceedings had been taken. It was their duty, said Lord Cottenham, to see that the committee duly passed his accounts.

Procedure in relation to the Bond.

Preparation of the bond.

The bond, and the affidavits ancillary thereto, are prepared in the office of the masters in lunacy. To obtain them the solicitor to the commission should attend with the office copies of the master's certificate as to the lunatic's property and the like, and of the order or fiat confirming the certificate, and a minute of the names and descriptions of the proposed sureties, the names and addresses of the committee of the person and of the estate, and the then residence of the lunatic. If no objection be made to the proposed sureties, the bond and affidavits are forthwith prepared and delivered out to the solicitor (*g*). There is no formal application of the sureties (*h*).

Execution.

Each execution of the bond must be attested by two witnesses, one of them duly verifying such execution by

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(*d*) R. L. 1890, 76.

(*e*) *Re Lockey*, 1 Phill. 509; *Re Hill*, 1 De G., J. & S. 487; and conf. 32 & 33 Vict. c. 71, s. 49.

(*f*) *Re Lockey*, *ubi sup.*; conf. *Dawson* v. *Raynes*, 2 Russ. 466.

(*g*) Elmer, p. 50.

(*h*) Ib.

affidavit; and the bond must be marked as an exhibit to each, where there are several affidavits of execution (*i*).

Approval by the master.

Certificate.

The bond from the committee, having been duly executed and returned to the office of the masters in lunacy, requires the approval of a master. This is signified by indorsement on the bond, and by a certificate of the completion of the security, which gives to the order of the judge in lunacy the effect of a grant (*k*). This certificate is filed by the master, who prepares an office copy on the solicitor bespeaking it. The bond and affidavits remain deposited in the office (*l*).

Procedure for reduction of security.

Where it is desired either to reduce or increase the security, the evidence required will be the same as that required on the periodical passing of the accounts (*m*).

Death or bankruptcy of the surety.

If a surety has died or become bankrupt or compounds with his creditors (*n*) and a fresh surety thus becomes necessary, the master, on summons taken out for the purpose, and having proof of the death, bankruptcy or insolvency of the surety, fixes a time within which the committee is to enter into fresh security. The proof of the death, bankruptcy or insolvency, as the case may be, may be either by affidavit on verifying the account or by separate affidavit. The subsequent proceedings are the same as on an original appointment (*o*).

The Enforcement of the Bond.

The records of the petty bag office show that the bond to the crown entered into by the committee of a lunatic's estate has always been treated as an obligation of the same force and effect as a statute staple within the statute 33 Hen. 8, c. 39 (*p*).

(*i*) Elmer, p. 50.

(*k*) 53 Vict. c. 5, s. 108, sub-s. (2); R. L. 1890, 117.

(*l*) Elmer, p. 51.

(*m*) Ib. p. 54.

(*n*) R. L. 1890, 76.

(*o*) Elmer, p. 54, ante, pp. 117 *et seq.*

(*p*) 2 Coop. T. L. C. 69; 11 M. & W. 776; conf. *Ex parte Usher*, 1 B. & B. 197; *Rex* v. *Lambe*, McClellan's R. 402; *Rex* v. *Wrangham*, 1 Cr. & Jerv. 408.

Accordingly the lands of the obligors are bound from the date of the execution of the bond, and the remedy against them is by extent, usually preceded, as in other cases, by a writ of *scire facias* (*q*). The bond is ordered to be delivered up, for the purpose of enforcement, to the proper officer in the office of the Queen's Remembrancer, where obligors, or some of them, are in England or Wales (*r*). Where all resided in Scotland, proceedings for enforcing the bond were instituted in the Scotch courts, and the fund recovered was deposited in a bank to await the order of the lord chancellor (*s*).

The remedy is by extent.

Procedure.

It should be added, that this remedy on the bond does not deprive the judge in lunacy of his direct authority over the committee of the estate, as an officer of the court, in respect of payment of money or otherwise; and if the committee should disobey an order for payment of what has been found due from him, the judge in lunacy may, if he thinks fit, enforce the order by attachment (*t*).

Ordinary powers over committee not limited by the bond.

The Discharge of the Security.

The occasions on which the security may be discharged are the death of the lunatic (*u*), or *supersedeas* of the commission on his recovery (*x*), the death (*y*) or discharge (*z*) of the committee and the substitution of fresh security (*a*). Sureties, therefore, seeking to be relieved of their liability can only obtain such relief by the express order of the court (*b*).

In each of these several cases the indispensable preliminary is the passing of the committee's accounts by himself

Must be preceded by the passing of the

(*q*) Vide *Rex* v. *Lawrence*, 2 Coop. T. L. C. 73; and conf. *Re Lacy*, 10 Price, 135.

(*r*) Elmer, p. 72; see the order in *Re Hill*, 1 De G., J. & S. 487.

(*s*) Erskine, Inst., by Ivory, 202, n.

(*t*) *Ex parte Grimstone*, Ambl. 706; see 1 & 2 Vict. c. 110, s. 18; 32 & 33 Vict. c. 71, s. 49.

(*u*) R. L. 1890, 81.

(*x*) Ib.

(*y*) Ib.

(*z*) Ib.

(*a*) Ib. 74; and vide *Re Bull*, 2 Coop. T. L. C. 63.

(*b*) *Re Bull*, *ubi sup.*; and conf. Kerr on Receivers, pp. 193 *et seq.*

committee's accounts.

or his personal representatives, as the case may be. Of the manner in which this is to be carried out, and of the dealings with surplus funds, if any, we shall speak hereafter (*c*).

Mode of discharge when secured by bond.

On the accounts being passed satisfactorily, and the balance, if any, paid over in the proper manner, the bond, if the security be by bond, will be delivered up to be vacated and

When by fund in court.

cancelled (*d*); and if the security be by the payment or transfer of a fund into court under the act, the masters will prepare minutes of an order for the payment or transfer of the fund in such manner as the committee requests, and the masters think proper, of the sum of money or stock, and the dividends thereon (*e*).

An order for such payment or transfer will be made by the judge without a certificate (*f*).

Sect. 4.—*Of the Deposit of Documents in the Masters' Office.*

Reference has been made to the advisability of the committee of the estate depositing all deeds and muniments of title in the masters' office (*g*).

Practice on deposit.

The intending depositor must leave the deeds at the office in a deed-box, lettered with the name of the lunacy, a schedule of its contents, a copy of the order for deposit, if any, an affidavit stating that the deeds are all the depositor has, and identifying them with those mentioned in the order, if any. A summons is then taken to compare them, served in the usual manner on the several parties, and the deeds, &c., are compared with the schedule. A second summons is taken on the completion of the examination; a certificate of deposit is afterwards given and filed by the masters in the ordinary way (*h*).

(*c*) Post, Bk. I. Pt. i. c. 17.

(*d*) R. L. 1890, 82; and conf. *Re Bull*, 2 Coop. T. L. C. 63, 67.

(*e*) R. L. 1890, 82.

(*f*) Ib.

(*g*) Ante, p. 121, *Re Eagle*, 2 Ph. 201.

(*h*) Elmer, p. 93.

Access to deposited documents.

All persons claiming to be interested in any documents deposited in the office are entitled to free access to them (*i*), but an order in lunacy is required, whether during the life (*k*) or after the death (*l*) of the lunatic. Nor will they be delivered out even to the committee of the estate, except upon evidence showing that it is necessary for the proper administration of the estate that they should be placed in the custody of the committee (*m*). Before a committee has been appointed leave of the court will be given to inspect documents deposited by a lunatic (*e.g.*, with a company for safe custody), and the court will order that the official solicitor in lunacy is to open and make a schedule of the documents (*n*).

(*i*) *Re Wood*, 33 L. J., N. S., Ch. 334; *In re Smyth*, 15 Ch. D. 286, and 16 Ch. D. 673.

(*k*) *Re Sartoris*, 1 N. R. 4; *Vivian* v. *Little*, 11 Q. B. D. 370.

(*l*) *Re Silcock*, 1 N. R. 4.

(*m*) *Re Cooper*, 1 M. & C. 33.

(*n*) *In re Campbell*, 13 Ch. D. 323.

CHAPTER XII.

OF COMMITTEES AD INTERIM.

More often appointed formerly than now.

It was, in former times, not uncommon, when the ordinary course of proceedings in lunacy was delayed, on account of a pending traverse or other cause, to appoint provisional committees *ad interim* for the protection of the lunatic's person and property in the meanwhile (*a*). These committees received no grant of the estate, and were accordingly incapable of conveying it (*b*). The larger powers of summary administration given to the judge in lunacy, by the Lunacy Act, render the appointment of *ad interim* committees in ordinary cases unnecessary, and they are very rarely appointed in the present day (*c*).

By the R. L., 1890, the masters may, whenever they think proper, before certifying the result of their inquiries, certify whether it is expedient that an *interim* committee of the person and estate should be appointed, and who is the proper person to be appointed (*d*).

Re Armstrong.

The case of *Re Armstrong* illustrates very fairly the circumstances under which the appointment might be made. In this case a lady, found lunatic, had obtained leave to traverse, and no committee had been appointed, her husband, who petitioned for the inquisition, having become incapable before the execution of the commission. The court appointed *ad interim* committees of the lady's person, with liberty to take such proceedings in relation to the

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(*a*) See the cases cited ap. Shelf. Lun., pp, 159—162; and cf. ib. pp. 175, 176.

(*b*) *Re Poulton*, 1 Mac. & G. 100.

(*c*) Elmer, p. 53.

(*d*) R. L. 1890, 29.

traverse, as they might think proper, but declined to make any order as to a committee of the estate (*e*).

Similar principles to those already discussed in respect of committees of the person and estate respectively, are applicable to the appointment of committees *ad interim*.

Security of a committee ad interim, by recognizance instead of bond.

A committee *ad interim* gives security by recognizance and not by bond (*f*). The recognizance is prepared and allowed by the master, and enrolled in the central office, as in the case of a receivership, described in the following chapter (*g*): and on the completion of the security the master gives and files a certificate, by which the appointment of the committee *ad interim* is perfected (*h*).

(*e*) *Re Armstrong*, 2 De G. & J. 123.

(*f*) Elmer, p. 53.

(*g*) Post, p. 135.

(*h*) Elmer, p. 53.

CHAPTER XIII.

OF THE APPOINTMENT OF A RECEIVER OF THE ESTATE.

Although it is the general, and certainly preferable, course to intrust to the committee of the estate personally the management and receipt of the rents and profits of the property of a lunatic (*a*), yet, under special circumstances, a receiver may be appointed for the purpose (*b*). These may arise—(i.) where it is found impossible to procure a committee who can give the security to account required of a committee (*c*), or who is willing to accept a grant of the estate without compensation (*d*) ; (ii.) where it is desirable to appoint a particular person as committee of the estate, but that person is either too infirm (*e*), or resides at too great distance from the estate (*f*) to fulfil the duties of his position (*g*) ; and (iii.) where the management of the estate is attended with considerable trouble (*h*). The presence, however, of any one of these conditions will not, without reference to the particular features of the case, necessarily determine the court to appoint a receiver (*i*).

Where a receiver will be appointed,

though not always, even in these cases.

An interim receiver of the estate of a supposed lunatic

(*a*) *Ex parte Billinghurst*, 1 Ambl. 104.

(*b*) Shelf. Lun. 186 ; Kerr on Receivers, pp. 78, 79.

(*c*) *Ex parte Billinghurst*, 1 Ambl. 104 ; *Ex parte Warren*, 10 Ves. 621.

(*d*) *In re Smith*, Shelf. Lun. 230 ; *In re Squire*, Ibid. 187 ; *Ex parte Warren*, 10 Ves. 621. In this last case the court admitted that the appointment of a receiver amounted virtually to the appointment of a committee of the estate with a salary.

(*e*) *In re Birch*, *cit. ap.* Shelf. Lun., p. 187.

(*f*) *In re Seaman*, ib.

(*g*) See, however, *In re Frank*, 2 Russ. 450, cited below.

(*h*) *In re Birch*, *ubi sup.* ; *In re Laugham*, 1 Jur. 281.

(*i*) Comp. *Ex parte Billinghurst*, *ubi sup.*, with *Re Frank*, 2 Russ. 450.

will be appointed in cases of extreme urgency even before service of the petition (*k*).

A disinterested person usually appointed.

It is a general rule, that a receiver should be wholly disinterested in the estate over which he is placed; but the court has a discretion to depart from this principle for the benefit of the estate. In these cases it is, under ordinary circumstances, required that the receiver shall undertake to act without a salary (*l*). But by the very hypothesis in most cases in which a receiver is appointed in lunacy it is because it has been found impossible to persuade a competent person to act gratuitously; in lunacy, therefore, the general principle would seem to be more cogent than elsewhere.

Exception.

Re Laugham.

Nevertheless, we have even in lunacy one case, if no more, in which, under the pressure of other considerations, it was departed from (*m*). In this case the proposed receiver was willing to act for a sum considerably below the ordinary allowance; he was approved of by the family of the lunatic; he had been well acquainted with the estate from a very early period of his life; it appeared to be beneficial to the estate that he should be appointed in accordance with the petition, and he declined to act as committee of the estate if another person were appointed receiver.

Other qualifications of a receiver.

The person appointed as receiver should be one who, consistently with his professional and other pursuits, can spare sufficient time for the duties of his office (*n*); he should not reside at a great distance from the estate (*o*), nor should he be one who, from privilege or other cause, is protected from the ordinary remedies which it may become proper to enforce (*p*).

(*k*) *In re Pountain*, 37 Ch. D. 609; *Re Ridley*, referred to Elmer, pp. 11, 15, 176.

(*l*) 2 Dan. Ch. Pr. 1681 *et seq.*; Kerr on Receivers, 94—100.

(*m*) *Re Laugham*, 1 Jur. 281.

(*n*) *Wynne* v. *Lord Newborough*, 15 Ves. 284; *Garland* v. *Garland*, 2 Ves. jun. 157.

(*o*) *Wynne* v. *Lord Newborough*, 15 Ves. 284.

(*p*) *Att.-Gen.* v. *Gee*, 2 V. & B. 208; *Wynne* v. *Lord Newborough*, 15 Ves. 284; *Att.-Gen.* v. *Day*, 2 Madd. 254; 2 Dan. Ch. Pr. 1683.

Certain persons whose appointment is improper.

A special class of persons who, however eligible in other respects, are from their position unsuitable nominees for the office of receiver, is composed of those whose duty, by virtue of their position, it is to call the receiver to an account (*q*); such, *e.g.*, are the solicitor to the commission (*r*) and the masters in lunacy (*s*).

Preference of the family will generally determine the appointment of a receiver;

but not always his removal.

Subject to the several grounds of objection above mentioned, preference will naturally and properly be given, in the appointment of a receiver, to the person who is approved of by the family of the lunatic (*t*). At the same time, when a person has once been approved of by the master, and received his appointment, and it is then desired by the family to substitute another person in his place, it is not enough to warrant the substitution that the other person should be shown to be more eligible; the acting receiver must be proved to be incompetent (*u*).

Former mode of appointing a receiver; by petition; on master's report confirmed by fiat.

It appears that an order, directing the masters in lunacy to appoint a receiver, might formerly have been obtained on petition without other formality (*x*); but a yet simpler method was common in practice, under s. 70 of the L. R. Act, 1853. In accordance with this, application was in the first instance made to the master, representing the desirability of appointing a receiver, and with it was left a proposal (*y*) stating the person to be appointed, adducing evidence as to his respectability and qualifications, and naming the persons willing to be his sureties (*z*). A

(*q*) Kerr on Receivers, pp. 98 *et seq.*; *Ex parte Pincke*, 2 Mer. 452; *Cookes* v. *Cookes*, 2 De G., J. & S. 530; *Stone* v. *Wishart*, 2 Madd. 64; *Taylor* v. *Oldham*, Jac. 527; *Wilson* v. *Poe*, 1 Hog. 322.

(*r*) *Ex parte Pincke*, 2 Mer. 452.

(*s*) Ib.; and compare the case of committees, ante, p. 114.

(*t*) *Re Lord Bangor*, 2 Moll. 518; *Re Laugham*, 1 Jur. 281.

(*u*) *Re Lord Bangor*, 2 Moll. 518.

(*x*) *Anon.*, 1 Atk. 489; *Ex parte Whitfield*, 2 Atk. 314; *Ex parte Mountfort*, 15 Ves. 445, 449; Elmer, p. 75; Kerr on Receivers, p. 101.

(*y*) Where the order of reference for the appointment of a receiver had been obtained on petition, a copy of this had to be left at the masters' office with the proposal. The proceedings then went on in the office without further report to the court, but were in other respects the same.

(*z*) It seems that the partners in

summons was then taken out on leaving and to proceed. If the evidence was satisfactory, the master reported the matter to the lord chancellor in lunacy, and on the confirmation of his report by fiat or special order, the fiat or special order was left at his office, that the receiver's security, which was by recognizance and not by bond (*a*), might be prepared. The amount which, by the former

Security by recognizance.

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trade of the receiver and persons in partnership together are usually rejected as sureties. Probably on the analogy of the solicitor in a suit, the solicitor to the commission would be rejected. See Kerr on Receivers, 114. The sureties must be persons resident in England, even though the property to be collected is out of the country. *Cockburn* v. *Raphael*, 2 Sim. & St. 453.

(*a*) This is important, the more so that some misconception seems to have arisen on the subject. It may be well, therefore, to point out the difference which in this respect exists between the security of a receiver and that of a committee. It is set forth in a learned note in *Cooper's* Cases, temp. Lord Cottenham, vol. 2, p. 63.

A receiver of the estate of a lunatic and his sureties enter into a recognizance with the two masters in lunacy (formerly they entered into such a recognizance with the master of the rolls and one of the masters in chancery), which recognizance is enrolled in the Central Office. But the committee of the estate of a lunatic and his sureties (as we have seen, ante, p. 120) execute a bond to the Queen, which bond is kept by the masters in lunacy (it was formerly kept by the clerk of the custodies). Consequently, when the recognizance is to be vacated, the clerk of the enrolments is ordered to attend the master of the rolls with the record of the recognizance for that purpose; but when the bond is to be cancelled, the master in lunacy is ordered to deliver it up for that purpose. See also p. 128, ante.

In *Ex parte Warren*, 10 Ves. 621, much of the hesitation felt by Lord Eldon in making the order appointing a receiver was due to the difference that existed in the character (and possibly in the amount) of the security required of a receiver and a committee respectively. His lordship finally decided to make the order, but directed that the receiver should be considered as committee, and give such security as should be satisfactory to the attorney-general, as was done by the committee. This was, as Lord Eldon said, virtually to appoint a committee with a salary. The recognizances are engrossed on parchment and signed, not sealed, by the several parties. By the Stamp Act, 1870, they require no stamp. See Dan. Ch. Pr. 1690. Recognizances may be taken and acknowledged before the masters in lunacy.

For the enforcement of the recognizance, see *Stratford* v. *Dodsley*, 2 Coop. T. L. C. 79; *Gifford* v. *Stimpson*, ib., 85.

practice at least, seems not to have been in all cases so large as that required of a committee, was fixed upon a similar principle to that security. The papers relating to the security when prepared and settled on summons in the masters' office, were delivered to the solicitor for completion. On the recognizance duly entered into being returned to the masters' office, it was allowed by him, and subsequently handed over to the enrolment office in chancery. The security was then considered as complete, and the master gave and filed with the registrar a certificate, which perfected the appointment (*b*).

Present practice.

The present practice will be for the application to be made to the judge to appoint a receiver of the estate of a lunatic so found, and the receiver will give security to be allowed by the masters, and the masters will fix a proper salary (*c*).

Security of receiver to be maintained.

The same precautions are of course taken for insuring the existence and sufficiency of the security where a receiver, as where a committee, is concerned. If, therefore, it appears, on the receiver passing his accounts, that his sureties are dead, or bankrupt, or have arranged or compounded with their creditors, the master will fix a time for new security being given, and, in case of default, inquire and certify who is the proper person to be appointed receiver of the estate of the lunatic in the place of the receiver making default (*d*).

Increase of security.

And so, also (on the analogy of the security of a committee as well as of other cases of receivers), the security of a receiver will be increased, where it appears that the income of the property has increased during his administration (*e*).

Salary of receiver.

It seems that there is no general rule as to the amount of the salary allowed to a receiver appointed by the court, but that it depends mainly on the degree of difficulty experienced in the collection of the property (*f*). The question of

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(*b*) Elmer, p. 76.
(*c*) R. L. 1890, 83.
(*d*) R. L. 1890, 76, 80.
(*e*) See Kerr on Receivers, 113.
(*f*) *Day* v. *Croft*, 2 Beav. 488. In this case, Lord Langdale, M.R.,

amount is generally reserved for consideration on passing his first account, though his salary may be fixed in the order appointing him (*g*).

Duties of receiver.

The duties of a receiver, like those of a committee of the estate, are rather ministerial than discretionary; he has generally a plain course to follow, viz., to pay into court, or as the court may direct, the money he yearly receives, and to expend nothing extraordinary without the order of the court (*h*). Under extraordinary expenditure fall the costs of bringing (*i*), and also of defending (*k*), actions, of taking the more direct legal proceedings, such as entry and distress (*l*), and of all but the simplest and least expensive repairs of the property (*m*).

Must not incur serious expense without order of the court.

At the same time it must be added, that, in one case, where a receiver had, without the authority of the court, defended an action on behalf of the estate with success, he was idemnified in respect of his costs (*n*).

Powers of receiver.

The rule requiring the authority of the court for a distress

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obtained certificates on the subject from the several masters in chancery from which it appeared there was no general rule existing. Perhaps where the property consists of real or leasehold estates, involving no particular difficulty, 5*l.* per centum upon the amount collected will be allowed; but see Kerr on Receivers, 164 *et seq.*; Seton on Decrees, 1006; Dan. Ch. Pr. 1696.

(*g*) Elmer, p. 76, and see preceding note.

(*h*) *Fletcher* v. *Dodd*, 1 Ves. jun. 85; *Blunt* v. *Clitherow*, 6 Ves. 802; *Waters* v. *Taylor*, 15 Ves. 10; and see p. 159, post.

(*i*) *Wynne* v. *Lord Newborough*, 1 Ves. jun. 164; *Ward* v. *Swift*, 6 Ha. 312; and see *Mansfield* v. *Hamilton*, 2 Sch. & Lef. 28; *Re Montgomery*, 1 Moll, 419.

(*k*) *Anon.*, 6 Ves. 287; *Swaby* v. *Dickon*, 5 Sim. 629.

(*l*) *Pitt* v. *Snowden*, 3 Atk. 750; *Raincock* v. *Simpson*, cit. ap. 1 Dick. 120; *Hughes* v. *Hughes*, 3 Bro. Ch. Cas. 87; *Brandon* v. *Brandon*, 5 Madd. 473; *Dancer* v. *Hastings*, 4 Bing. 2; but see below.

(*m*) *Blunt* v. *Clitherow*, 6 Ves. 799; *Att.-Gen.* v. *Vigor*, 11 Ves. 563; and see *Tempest* v. *Ord*, 2 Mer. 55; *Fletcher* v. *Dodd*, 1 Ves. jun. 85; *Waters* v. *Taylor*, 15 Ves. 25.

(*n*) *Bristowe* v. *Needham*, 2 Phill. 190. Also, if the possession of a tenant under a receiver is disturbed, and no application made to the court to prevent the disturbance, the tenant is entitled to the costs of protecting his own possession. *Miller* v. *Elkins*, 3 L. J., Ch. 128.

Distress.

is applicable only where there is no legal privity between the tenant and the receiver. The tenants, however, can, in all cases, be compelled to attorn to the receiver of an estate (*o*), after attornment, the receiver is perfectly competent to distrain on them for arrears of rent without any sanction or order of the court in that behalf (*p*). The principle on which this freedom of action is accorded to the receiver is explained by Lord Hardwicke, in a passage also quoted by Mr. Bullen, in his treatise on Distress (*q*). The delay occasioned by the application for permission is liable to prejudice the estate, by giving the tenant an opportunity, in the interval, to remove all distrainable property.

A further question in relation to distress has arisen with regard to the length of arrears for which a receiver may distrain. It has been asserted, on the authority of *Brandon* v. *Brandon* (*r*), that the period is limited to a year; but in this case, as has been well pointed out, the tenants had

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(*o*) See Kerr on Receivers, pp. 139, 140; Dan. Ch. Pr. 1693; and cases there cited.

(*p*) *Pitt* v. *Snowden*, 3 Atk. 750; *Dancer* v. *Hastings*, 4 Bing. 2; *Bennett* v. *Robins*, 5 C. & P. 379; *Brandon* v. *Brandon*, 5 Madd. 473.

(*q*) Pp. 72, 73. See also *Oldham and Foster's Law of Distress*, p. 76. The passage is from *Pitt* v. *Snowden*, 3 Atk. 750, and runs as follows: "Lord Hardwicke said in this case that receivers appointed by the court have a power, when they see it necessary, to distrain for rent, and need not apply first to the court for a particular order for that purpose; and that he often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the meantime; for the court never makes an immediate order for a distress, but allows on such applications a future day for the tenant to pay." "If, however, there should be any doubt who had a legal right to the rent, then the receiver, as *he* must distrain in the name of the person who has that right, would very properly make an application to the court for an order." Conf. *Hughes* v. *Hughes*, 3 Bro. Ch. Cas. 87; 1 Ves. jun. 161. In the case of lunacy, as the freehold remains in the idiot, notwithstanding the king's custody, *à fortiori* does it in the lunatic. See also Woodfall on Landlord and Tenant (ed. 14), pp. 61, 281, 447; and as to the effect of attornment, *Evans* v. *Mathias*, 7 E. & B. 590; *Doe* v. *Read*, 12 East, 57. Where there has been attornment, the receiver should distrain in his own name. *Jolly* v. *Arbuthnot*, 4 De G. & J. 224.

(*r*) 5 Madd. 473.

not attorned to the receiver, and the legal estate was vested in trustees, the motion in the case being for leave to distrain in their name. The case of *Brandon* v. *Brandon*, therefore, can be taken only as a decision that where the legal estate is outstanding, and there has been no attornment to the receiver, the receiver cannot distrain for arrears beyond the period of one year. At the same time it should be observed, that, as the receiver is entitled to all arrears of rent, it is more reasonable that, as a rule, he should after attornment be at liberty to distrain for all arrears that may be due (*s*). Mr. Shelford (*t*) refers to *Brandon* v. *Brandon* as an authority for the positive statement that for arrears within a certain period the receiver may distrain at his discretion, an inaccuracy due partly, though not altogether, to the fact that he has not remarked the difference made by the attornment of the tenants.

Repairs.

According to the latest practice it appears that all expenditure on repairs which exceeds the sum of 30*l.* in any year will be regarded as extraordinary (*u*); but it is submitted that some account must necessarily be taken of the size of the estate.

Letting.

In the case of *Morris* v. *Elme* (*x*) it was said that a receiver could not let the estate without the sanction of the court. By the present practice, under ordinary circumstances, a receiver appointed by the High Court may let at his discretion for a year certain, or less, or for any time not exceeding three years, without applying for the sanction of a judge (*y*); but even thus his power is limited to such parol leases as are authorized by the second section of the Statute of Frauds.

It should, moreover, be constantly remembered that the

(*s*) Comp. Kerr on Receivers, 141 *et seq.* The limitation is not noticed in the marginal abstract in Maddock nor by Woodfall in his treatise on Landlord and Tenant. And see now R. L. 1890, 83, 84.

(*t*) Shelf. Lun. p. 189.

(*u*) Dan. Chanc. Pract. 1700, n. (*m*); Kerr on Receivers, 152, 153.

(*x*) 1 Ves. jun. 139.

(*y*) *Shuff* v. *Holdaway*, 2 Dan. Chanc. Pract. 1699.

court, in matters of lunacy, exercises a very strict supervision over all dealings with the estate of the lunatic; and the Rules in Lunacy do not give the receiver any special powers as to leasing (*a*). However, where the estate over which the receiver is appointed is in the colonies or in a foreign country, more extensive powers are usually given to him (*b*).

Committee of the estate required in addition to a receiver.

Notwithstanding the appointment of a receiver, it usually happens that a committee of the estate is also required for the more effectual management of the lunatic's property, the granting of leases and performance of other legal acts, which a receiver, not having the legal custody of the estate, is unable to perform (*c*). Where this is the case, the committee is restrained by the order appointing him from receiving any part of the lunatic's moneys, and gives nominal security only (*d*); it appears, moreover, that he is the proper person to communicate to the court any questions or applications relating to the property (*e*).

As to further details respecting the position and duty of a receiver, it should be added that, by rule 84 of the R. L., 1890, the provisions respecting the committee of the estate, his accounts, payments, allowances and matters of the like nature are to be deemed to extend, so far as applicable, with the necessary modifications, to the case of a receiver (*f*).

(*a*) R. L. 1890, 83, 84. For the supervision of the court in the like matters, compare the chapter on the Management of the Estate, p. 158, post. It is presumed that the receiver will have a power to determine leases; conf. *Doe* v. *Read*, 12 East, 57. Previously to the orders of 1853 it was held, that the receiver ought personally, or, if there be a committee of the estate, by the committee, to move for liberty to let, before the old lease expires; else he would be visited with any loss that might occur. *Wilkins* v. *Lynch*, 2 Moll. 499.

(*b*) *Baylies* v. *Baylies*, 1 Coll. 545; *Morris* v. *Elme*, 1 Ves. jun. 139; —— v. *Lindsey*, 15 Ves. 91.

(*c*) Elmer, p. 77.

(*d*) Ib. pp. 48, 77; *Re Billinghurst*, Ambl. 104.

(*e*) *In re Kilkenny*, 7 Ir. Eq. Rep. 594; *In re Doolan*, 2 Con. & L. 232

(*f*) Compare pp. 113 *et seq.*, ante; pp. 158 *et seq.*, post.

So receivers may be called upon to account by summons at chambers (*g*); they may be ordered to be examined on interrogatories touching their management (*h*); they may not make interest on money in their hands (*i*); they are liable to commitment for disobedience to the order of the court (*k*).

(*g*) Mos. C. C. 40; *Re Burke*, 1 Ball & B. 74.

(*h*) *Re Lloyd*, *cit. ap.* Shelf. Lun. 240.

(*i*) *Shaw* v. *Rhodes*, 2 Russ. 539.

(*k*) *Davies* v. *Calcroft*, 14 Ves. 143; Mos. C. C. 40.

CHAPTER XIV.

OF THE TERMINATION OF THE OFFICES OF COMMITTEE OF THE PERSON AND ESTATE.

The tenure of office by the committees of the person and estate respectively is terminated by a variety of causes, some of which are common to both offices, while others apply to one of them only.

1, 2. Death of committee or lunatic.
3. Supersedeas.

Both offices are terminated by the death of the holder, by the death of the lunatic, or by the *supersedeas* of the inquisition.

The proceedings consequent upon these several events are described elsewhere in this treatise (*a*).

4. Misconduct.

Either committee, again, is liable to be removed from his office for misconduct (*b*), either directly affecting the trust committed to him or otherwise. To the former class belong default in completing or increasing his security when necessary (*c*); neglect in passing accounts or payment into court (*d*); omission to visit the lunatic or provide for his comfort to the extent warranted by the allowance for maintenance (*e*); refusal to defend an action on behalf of the lunatic (*f*), and the like. Under the latter head, a committee has been dismissed for publishing a pamphlet reflecting on persons acting under the lord chancellor's orders in the management of the lunatic's affairs (*g*).

5. Bankruptcy, though not

The court will not, however, necessarily remove a committee of the person, merely on the ground of his having

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(*a*) Post, pp. 196, 200, 201.
(*b*) *Re Fitzgerald*, 2 Sch. & Lef. 436.
(*c*) R. L. 1890, 80.
(*d*) *Re Lockey*, 1 Phill. 509.
(*e*) *Ex parte Proctor*, 1 Swanst. 531.
(*f*) *Lloyd* v. ——, 2 Dick. 460.
(*g*) *Ex parte Jones*, 13 Ves. 237.

become a bankrupt, whether he has obtained his discharge or not (*h*). In one case, even though the committee, having obtained his certificate, possessed no other funds than those which were given for the maintenance of the lunatic, and might have been supposed to be under a temptation to appropriate them to his own benefit, the court refused to change the custody of the person unless it was proved to be impracticable to secure his maintenance otherwise. For, said Lord Eldon, the court in such cases still has a species of control over the funds; and the true subject of consideration is, whether the committee has done what is required for the comfort of the lunatic, which in many cases is best promoted by not changing the custody of the person (*i*).

necessarily in case of committee of person,

Neither will the bankruptcy of the committee of the estate necessarily be a sufficient ground for his removal (*k*). The committee may, however, be removed on this ground (*l*); and where he is not removed, it seems proper that he should be suspended from his office until he has obtained his discharge and the bankruptcy is closed (*m*). Meanwhile a receiver may be appointed in the ordinary way. The order will direct the committee to complete the passing of his accounts, and that the receiver prosecute the orders made for that purpose. Where any thing is due from his estate it will be referred to the masters to inquire if any and what proceedings should be taken in reference to it; and the trustee in bankruptcy may be ordered to deposit upon oath in the masters' office all deeds, papers, and writings in his custody or power, relating exclusively to the lunatic's estate, or the committee's accounts of the same.

nor of committee of estate,

yet committee of estate should be suspended till he is discharged,

and a receiver appointed meanwhile.

On the close of the bankruptcy, the committee, having

(*h*) *Ex parte Mildmay*, 3 Ves. 2; *Ex parte Proctor*, 1 Swanst. 531.

(*i*) *Ex parte Proctor*, 1 Swanst. 531.

(*k*) *Re Chambers*, *cit. ap.* Shelf. Lun. p. 233.

(*l*) *Re Barrow*, ib.

(*m*) *Re Chambers*, *ubi sup.*

received his discharge, may apply to resume the committeeship (*n*).

The same remarks will apply to liquidation by arrangement.

6. Non-residence of committee of person,

or his taking the lunatic out of the jurisdiction.

For the reasons already alluded to, the court requires the committee of the person to reside within the jurisdiction, and his going permanently beyond it seems in general to be a sufficient cause for removing him (*o*). Similarly, the committee is required to retain the lunatic himself within the jurisdiction, and he may not remove him beyond it without the permission of the court (*p*). Under circumstances, indeed, in which the health and comfort of the lunatic had been materially benefited by a residence in Scotland, commenced without the sanction of the lord chancellor, and his nearest relations lived in that country, while the health of his committee, who was in England, precluded the hope of his often visiting the lunatic, an order was made permitting the continued residence of the lunatic in the former country (*q*). Security was, however, required of the committee for bringing the lunatic within the jurisdiction whenever he should be required to do so, and the lord chancellor observed that he was not aware of any precedent for the order (*r*).

Procedure in case of temporary absence.

In cases where only a temporary absence of the committee is contemplated, it seems that a reference to the master may be directed to approve of a proper person to be intrusted with the care of the lunatic until his return (*s*).

Non-residence of committee of estate not

The circumstance that a committee of the estate resides at a distance from the property of the lunatic is not in itself a ground for discharging him, although it may raise

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(*n*) Ib.

(*o*) *Ex parte Ord*, Jac. 94 ; *In re Bruère*, 17 Ch. D. 775.

(*p*) Elmer, p. 84, and cases cited in note (*q*), infra.

(*q*) *Re Jones*, 1 Phill. 461 ; and see *Re Stair*, 1 Coop. T. L. C. 227 ; *Re Hackett*, 3 Ir. Ch. Rep. 375 ; and ante, pp. 110, 111.

(*r*) See cases cited above, and ante, pp. 110, 111.

(*s*) *Re Aguilar*, *cit. ap.* Shelf. Lun. p. 234.

a case for inquiry before the master as to the propriety of his being discharged (*t*).

necessarily a ground for removing him.

A committee may himself apply to the judge in lunacy to be discharged from his office, or may obtain a certificate in favour of his discharge from the master, which will in a proper case be confirmed by fiat (*u*). The latter is apparently the preferable method (*x*).

7. Application of the committee.

Finally, it is enacted that unless the medical attendant of a lunatic reports and certifies that the patient is still of unsound mind, in accordance with s. 115 of the Lunacy Act (App., post), the order for commitment of the person will expire. The masters have power to extend the periods fixed for sending in medical reports and certificates (see s. 115 of L. Act, App., post).

8. Determination of orders for custody of person under Lunacy Act, s. 115.

The committee may be liable for the costs of his discharge and of the appointment of a new committee (*y*).

In every case of removal or discharge of the committee of the estate, and of the committee of the person when he is, from the form in which maintenance is allowed, liable to account, the final account must be passed in the usual way before he can be properly discharged. On the discharge being completed the committee's sureties will be released, the bond cancelled, and the cash or stock in court re-transferred, as in other cases (*z*). Proceedings are also immediately taken for the appointment of his successor (*a*).

Final account must in all cases be passed before discharge.

(*t*) *Re Brown*, 1 Mac. & G. 201.

(*u*) Elmer, pp. 73, 74.

(*x*) Conf. *Re French*, L. R., 3 Ch. 317.

(*y*) Elmer, p. 74, and conf. the case of trustees, Lewin on Trusts, p. 618.

(*z*) Ante, p. 127; post, pp. 195 *et seq.*

(*a*) R. L. 1890, 80.

CHAPTER XV.

OF THE ALLOWANCE FOR THE MAINTENANCE OF LUNATICS AND THEIR HOUSEHOLDS.

SECT. 1.—*Of the Inquiry as to the Allowance.*

Inquiry, when made.

As soon as may be after the finding on the inquisition the party having the conduct of the proceedings must take out a summons before the masters to inquire into the property of the lunatic and the amount proper to be allowed for his past and future maintenance (*a*). The inquiry may be repeated as often as changes in the circumstances of the lunatic or his household render it advisable (*b*). The result of the inquiries is stated in the certificate, and objections to and the confirmation of the certificate taken in the way already pointed out (*c*).

Cases of temporary insanity.

The ordinary time for considering maintenance is after the appointment of committees (*d*); but if it appears to the judge that there is reason to believe that the unsoundness of mind is in its nature temporary, and will probably be soon removed, and that it is expedient that temporary provision should be made for the maintenance of himself, or of himself and the members of his immediate family who are dependent upon him for maintenance, then, if there be any sum of money arising from or being in the nature of income or of ready money belonging to the lunatic, and standing to his account with a banker or agent, or

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(*a*) "Also the king shall provide . . . that they and their households shall live and be maintained competently with the profits of the same." 17 Edw. 2, c. 10; *Ex parte Annandale*, Ambl. 81; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. at p. 688; R. L. 1890, 27.

(*b*) R. L. 1890, 27.

(*c*) Ante, p. 37.

(*d*) Elmer, p. 23.

which, being in the hands of any person for his use, is readily available and may be safely and properly applied in that behalf, the judge may allow thereout such amounts as he may think proper for the temporary maintenance required, and may, instead of proceeding to order a grant of the custody of the estate, order or give liberty for the payment of any such sum of money, or any part thereof, to such person as he may, under the circumstances, think proper to entrust with the application thereof, and may direct the same to be paid to such person accordingly. The receipts of the person so entrusted are a good discharge, and he passes an account of his receipts before the master when required (*e*).

SECT. 2.—*Principles regulating the Allowance.*

The comfort of the lunatic.

1. The court will regard primarily the comfort of the lunatic himself, to the comparative disregard of conflicting interests (*f*).

The next of kin or other persons presumptively entitled on the death of the lunatic are, in themselves, no objects of the court's solicitude (*g*). Creditors even will only be paid when it is for the accommodation of the debtor (*h*). And

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(*e*) 53 Vict. c. 5, s. 127.

(*f*) *Re Annesley*, Amb. 78; *Ex parte Annandale*, Ambl. 81; *Dormer's case*, 2 P. Wms. 265; *Ex parte Chumley*, 1 Ves. jun. 296; *Ex parte Baker*, 6 Ves. 8; *Brodie* v. *Barry*, 2 Ves. & B. 39; *Smith* v. *Att.-Gen.*, cit. 2 Mer. 101; *Re Cotton*, 2 Mer. 100, n.; *Ex parte Whitbread*, 2 Mer. 99; *Re Lansborough*, 7 Ir. Eq. Rep. 606; *Re Blair*, 1 M. & C. 300; *Re Carysfort*, Cr. & P. 76; *Re Clarke*, 2 Ph. 282; *Ex parte Chambers*, 4 L. J., N. S., Ch. 175; *Rudland* v. *Crozier*, 2 De G. & J. 143; *Re Frost*, L. R., 5 Ch. 699; *In re Evans*, 21 Ch. D. 297; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672; *Re Mackenzie*, 43 L. T. N. S. 681; *In re Darling*, 39 Ch. D. 208. So by the French law, "*Les revenus d'un interdit doivent être essentiellement employés à adoucir son sort et à accélérer sa guérison*," C. C. 510.

(*g*) See the cases cited in the last note.

(*h*) *Ex parte Dikes*, 8 Ves. 79; *Ex parte Hastings*, 14 Ves. 182;

the allowance is not limited, as that of an infant is, within the bounds of income, but the capital may, in a proper case, be invested in the purchase of a life annuity (*i*). Where part only of the income has been originally allowed, or where the income has increased, the allowance may also be increased upon adequate grounds (*k*).

In accordance with this first principle, the masters endeavour to inform themselves as to the tastes, habits, amusements and occupations of the lunatic, the places of residence most suitable to his constitution, and the personal and professional care which will conduce to his comfort or recovery (*l*).

The wants of those legally dependent on him.

2. The second object of the court's regard is the lunatic's household, or those who are legally dependent upon him (*m*).

It is indeed chiefly due to the varying circumstances of these persons, the growth and increasing necessities of his children, the enlargement of the establishment, and the like, that the allowance is sought to be increased (*n*).

Re Tayler, cit. 3 Mac. & G. 427; *Re Leigh*, 40 L. J., N. S., Ch. 442; *In re Sitwell*, W. N. 1881, p. 124; *In re Pink*, 23 Ch. D. 577; see also *Horne* v. *Pountain*, 23 Q. B. D. 264; *In re Rhodes*, 44 Ch. D. 94; Shelf. Lun. p. 458; and see *Dormer's case*, 2 P. Wms. 265, and Mr. Cox's note; ante, p. 93.

(*i*) *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 110; *Re Persse*, 3 Moll. 94; post, p. 154.

(*k*) *Re Creagh*, Dr. & Wal. 323; *Re Melhuish*, 1 W. R. 236; *Re Haran*, ib.; *Re Liebenrood*, 6 Jur. 721; *Ex parte Chumley*, 1 Ves. jun. 296; *Ex parte Baker*, 6 Ves. 8.

(*l*) Elmer, p. 23.

(*m*) 17 Edw. 2, c. 10; but a committee of the estate should have been appointed before an allowance will be made for maintenance of wife or children. *Re B.*, 1 Ir. Eq. Rep. p. 181.

(*n*) *Ex parte Lineham*, 1 J. & Lat. 29; *Re Creagh*, Dr. & Wal. 323; *Foster* v. *Marchant*, 1 Vern. 263; *Ex parte Tottenham*, 11 Ir. Eq. Rep. 414; *Grosvenor* v. *Drax*, 2 Knapp, 82. In *Re Robinson*, L.JJ., 1872, a sum of stock producing 199*l.* per annum was settled on the lunatic for life, remainder to his children (two in number) with the usual clauses. The lunatic's wife, who was separated from him, received 60*l.* per annum alimony. It was ordered that 50*l.* of the stock should be at once sold to fit out the boy (æt. 11) for school, and further sums of 50*l.* every half-year to provide for the boy's schooling and maintenance, the whole advance not to exceed 500*l.* In the same matter,

3. The court, however, sometimes goes on to make some provision for persons closely connected with the lunatic, or in whom he would naturally be interested, though they are not legally dependent upon him (*o*). In doing so it asserts its absolute discretion to extend or refuse to extend the allowance for their benefit (*p*).

The wants of those connected with but not legally dependent on him.

This practice is traced to an order of Thurlow, C., in *Re Cotton* (*q*); whatever its origin, it is now established by many decisions.

The ground of the practice was stated by Lord Eldon to be, not that the parties are next of kin of the lunatic, or as such have any right to an allowance, but that the court will not refuse to do on behalf of the lunatic that which it is probable the lunatic himself would have done (*r*).

The practice has been gradually extended, though with extreme hesitation, and not unfrequently with a protest against the particular decision being drawn into a precedent (*s*), to the following classes :—

Growth of the third principle.

(a.) Adult children of the lunatic, for their maintenance and advancement in life (*t*), particularly for the maintenance and outfit of daughters married, or about to be married (*u*), and in some cases even the payment of their debts (*x*). Even where no previous order had been obtained, or where the committee had exceeded the amount

Adult children.

L.JJ., 1874, Mar. 7, the boy's allowance was increased to 120*l.* per annum, and the committee's visits reduced from four to one.

(*o*) See the cases cited in the succeeding notes.

(*p*) Ibid.

(*q*) 2 Mer. 100, n.

(*r*) *Ex parte Whitbread*, 2 Mer. 99 ; cf. *Re Blair*, 1 Myl. & Cr. 300 ; *Tweddell* v. *Tweddell*, T. & Russ. 1 ; *Petre* v. *Petre*, 3 Atk. 511 ; *In re Evans*, 21 Ch. D. 297 ; *In re Darling*, 39 Ch. D. 208.

(*s*) *Re Blair*, *ubi sup.* ; *Re Carysfort*, Cr. & Ph. 76 ; whereon see 11 Paige, Ch. Rep. 260 ; *Re Clarke*, 2 Ph. 282 ; *Re Frost*, L. R., 5 Ch. 699 ; *In re Evans*, *ubi sup.* ; *Re Mackenzie*, 43 L. T. N. S. 681.

(*t*) Cf. *Re Alderson*, Coll. Lun. App. p. 574.

(*u*) *Ex parte Fowler*, 6 Jur. 431 ; *Re Drummond*, 1 Myl. & Cr. 627 ; and the cases cited in the notes thereto. In all these cases the master was directed to receive and approve proposals for a settlement.

(*x*) *Re Medhurst*, Coll. Lun. App. 564 ; *Re Le Heup*, Shelf. Lun. 203.

warranted by an order, sums of money applied by him for the children of the lunatic have, in fact, been allowed by the court (*y*); but the proper course is to obtain the sanction of the court in the first instance. A form of order for an increase of the allowance on the marriage of a daughter will be found in *Re Drummond* (*z*). In the previous case of *Re Freak*, a complete scheme was approved, the net income being divided into thirty-two equal parts, seventeen of them allowed for the maintenance of the lunatic, his wife and two unmarried daughters, and the remaining fifteen paid to the four married children and the issue of a deceased child (*a*).

(b.) Head of the family. The court will often make an allowance to the person in the position of head of the lunatic's family and probable successor to his property, though he may be only related to the lunatic collaterally, and the next of kin do not consent (*b*).

Next of kin.

(c.) Next of kin. In *Re Blair* (*c*), the lunatic, a lady, aged and apparently incurable, was maintained adequately, at the cost of 670*l.* per annum, out of an income of 2,000*l.* Lord Cottenham, after hesitation, allowed an increase of 600*l.* to be divided between two next of kin, the third consenting.

In *Re Croft* (*d*), the lunatic, seventy-six, clear balance of income, 600*l.*; 100*l.* per annum allowed to one of two next of kin, aged seventy-four, the committee and other next of kin consenting, but Turner, L.J., expressly stated that this case was not to be taken as a precedent.

In *Re Clarke* (*e*), the lunatic, aged forty, had a father, mother, two brothers and a sister, and a net income of 2,760*l.*, of part of which he was tenant in tail, remainder

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(*y*) *Foster* v. *Marchant*, 1 Vern. 263; *Re Medhurst*, *ubi sup.*

(*z*) 1 Myl. & Cr. 627; cf. *Re Le Heup*, *ubi sup.*

(*a*) Shelf. Lun. 210.

(*b*) *Re Sparrow*, 20 Ch. D. 320; *Re Beridge*, 50 L. T. N. S. 653.

(*c*) 1 Myl. & Cr. 300.

(*d*) 32 L. J., N. S., Ch. 481; *In re Evans*, 21 Ch. D. 297; *In re Darling*, 39 Ch. D. 208; *Re Sparrow*, 20 Ch. D. 320; *Re Beridge*, 50 L. T. N. S. 653.

(*e*) 2 Ph. 282.

to his next brother. 1,270*l.* allowed; 470*l.* for the lunatic, 350*l.* for the father, 350*l.* for the next brother, 100*l.* for the younger brother.

On the father's death, allowance continued at the same amount, 470*l.* for the lunatic, 500*l.* for the next brother, 200*l.* for the younger brother, 100*l.* for the sister.

In *Re Frost* (*f*), the lunatic, a lady, aged fifty-nine. 620*l.*, out of 4,500*l.*, allowed for personal maintenance. Small allowances were made out of the balance to six or seven cousins, in poor circumstances, for whom the lunatic and her mother had shown some intention to provide, though they were only supposed to be the next of kin (no others having appeared in answer to the usual advertisements), and their title had not been proved.

Finally, in *Re Sparrow* (*g*), and *Re Beridge* (*h*), the court made an allowance to the nephew of a lunatic tenant for life, the nephew being first tenant in tail in remainder.

The principle that the court acts, as the lunatic would act, and not by reference to future interests in the estate, is supported by two negative instances.

In *Re Windsor* (*i*), the lunatic, seventy-five, tenant for life of 1,190*l.*, with remainder in tail to his great nephew, aged eight, the balance of income 800*l.*; the mother of the infant only 40*l.* per annum. Yet, as the balance of income was required for contingent expenses, *e.g.*, renewal of leases, and the lunatic was every other day capable of expressing his wishes, Brougham, C., refused the petition.

In *Re Lanesborough* (*j*), a similar case, though there does not appear to have been any special destination for the balance of income, Sugden, C., also refused. "It is," he said, "to take one man's money and give it to another."

(*f*) L. R., 5 Ch. 699; *Re Mackenzie*, 43 L. T. N. S. 681; where allowances were continued until further order to certain poor members of the lunatic's family, Cotton, L.J., saying he was almost going beyond what the Court had done before; *In re Evans*, 21 Ch. D. 297; *In re Darling*, 39 Ch. D. 208.

(*g*) *Re Sparrow*, 20 Ch. D. 320.

(*h*) *Re Beridge*, 50 L. T., N. S. 653.

(*i*) Shelf. Lun. 208.

(*j*) 7 Ir. Eq. Rep. 606.

In *In re Evans* (*k*), the court refused to make an allowance out of surplus income to the lunatic's first cousins, who were personally unknown to him.

Illegitimate children.

(d.) Illegitimate children of the lunatic have, however, been considered, and that, whether (*l*) or not (*m*) he had expressed an intention of providing for them; but an increase of allowance for the benefit of their mother (*n*) as also for that of the illegitimate children of a brother, to whose support the lunatic would probably have contributed if sane (*o*), has been refused.

Pension of servant.

(e.) A retiring pension to an old personal servant has been allowed, where the income was considerable (*p*).

Charitable subscriptions.

(f.) In *Re Frost* (*q*), above mentioned, certain payments to charities, to which the lunatic and her mother had subscribed, were continued.

Charitable donations.

(g.) In *Re Strickland* (*r*), the lunatic tenant for life of 2,240*l.* per annum, house property in London, surplus income 900*l.* On three houses being taken by a church committee, leave was given to the committee, sole next of kin, to subscribe out of the income 250*l.* to the church, and a like sum to the school in connection with it.

For the increase of the allowance as an indirect way of remunerating the committee, v. ante, p. 116.

Form of order.

Where the allowance is increased for the benefit of a relative, it is usually directed, that whatever he may receive shall be taken into account against any share he may have in the lunatic's estate (*s*), on a principle akin to hotchpot, a name actually applied to it by a distinguished American chancellor (*t*).

(*k*) 21 Ch. D. 297; *Re Darling*, 39 Ch. D. 308.

(*l*) *Re Jodrell*, Shelf. Lun. 210; *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.

(*m*) *Ex parte Haycock*, 5 Russ. 154.

(*n*) *Ex parte Haycock*, *ubi sup.*

(*o*) *Re Grove*, 13 L. J., N. S., Ch. 262.

(*p*) *Re Carysfort*, Cr. & Ph. 76.

(*q*) L. R., 5 Ch. 699.

(*r*) L. R., 6 Ch. 226.

(*s*) Cf. *Re Croft*, 32 L. J., N. S., Ch. 481; *Re Frost*, L. R., 5 Ch. 699; *et ubi sup.*

(*t*) 11 Paige, Ch. Rep. 259, per Walworth, C.

The allowance to these various connections of the lunatic is strictly personal, and must be appropriated to the designated purpose. They may not anticipate or alienate it (*u*), nor have their creditors any claim upon it. It is given them in order to enable them to live in a respectable manner (*v*).

Allowance strictly personal.

Sect. 3.—*Of the Order in which Income derived from different Sources should be applied.*

Where there is nothing in the muniment of title, if any, under which any part of the lunatic's property is held to determine this order, the advantage of the lunatic himself is to be considered, and any one fund or estate may be charged to the exclusion of the other or others (*x*); if there is no balance of advantage to the lunatic, the several sources of income should be resorted to rateably (*y*).

That most for the benefit of the lunatic.

Where order indifferent funds resorted to rateably.

A frequent case of collision occurs, where property has been left to trustees upon trust to apply the income towards the maintenance and support of the lunatic, who is entitled to other property absolutely. Here resort to the trust fund will generally be to the benefit of the lunatic. At the same time the testator may have so expressed himself as to show an intention that the trust fund should be applied only if other sources fail (*z*), or so as to leave an absolute discretion to his trustees. In the latter case the court will not interfere with the discretion, unless contribution is actually needed for the comfort of the lunatic (*a*).

Where found in the hands of trustees with discretion to apply or not.

(*u*) *In re Robinson*, 27 Ch. D. 160.

(*v*) *Ex parte Lineham*, 1 J. & Lat. 29; *In re Robinson*, *supra*.

(*x*) *Re Ashley*, 1 Russ. & M. 371; *Rudland* v. *Crozier*, 2 De G. & J. 143; *Methold* v. *Turner*, 4 De G. & Sm. 249; *Foljambe* v. *Willoughby*, 2 S. & S. 165; *Rawlins* v. *Goldfrap*, 5 Ves. 440; *Bruin* v. *Knott*, 1 Ph. 572; *In re Weaver*, 21 Ch. D. 615; *In re Rhodes*, 44 Ch. D. 94.

(*y*) *Annandale* v. *Annandale*, 2 Ves. sen. 381; cf. *Woodhead* v. *Marriott*, C. P. Coop. 64.

(*z*) Cf. *Rawlins* v. *Goldfrap*, 5 Ves. 440.

(*a*) *Re Sanderson's Trusts*, 3 K. & J. 497; *Gisborne* v. *Gisborne*, 2 App. Cas. 300.

Separate income of feme covert.

A special example occurs in the case of married women entitled to separate income. Here, too, the court "looks to the substantial benefit of the object of the commission, and will, therefore, consider the extent, not only of the husband's means, but of his obligation to maintain her" (*b*).

Sect. 4.—*Of the Practice when the Income is insufficient for Maintenance.*

Purchase of annuity.

1st. If the course seems reasonable, the court will sink a part, or even the whole, of the capital belonging to the lunatic in the purchase of an annuity for his life (*c*). Thus, in *Ex parte Stonard* (*d*), the lunatic a bachelor, after payment of his debts a balance of 800*l.* only; order for purchase of a life annuity with the whole.

In *Re Fisher* (*e*), the lunatic a spinster, aged forty-nine, and, according to medical evidence, incurable, her property 750*l.* consols; order for purchase of a life annuity of 30*l.*, at the price of 397*l.* 12*s.*

A previous petition to apply, out of corpus and income, an annual sum of 60*l.*, until the lunatic was admitted as an incurable patient to St. Luke's Hospital, at a weekly charge of seven shillings, had been refused.

Sale of land or stock.

2nd. Sect. 117 of L. Act, 1890, provides for the sale, charge or other disposition of any property of the lunatic (*f*), for, among other things,

(a) The payment of the lunatic's debts or engagements.

(b) Discharge of any incumbrance on his property.

(c) Payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit.

(d) Payment of or provision for the expenses of his future maintenance.

(*b*) *Brodie* v. *Barry*, 2 Ves. & B. 39; *Re Cay, Re Evans*, Shelf. Lun. 204 *et seq.*, and cf. *Edwards* v. *Abrey*, 2 Coop. T. L. C. 177, and post, Bk. II. c. 2, s. 2.

(*c*) Post, p. 192.

(*d*) 18 Ves. 285.

(*e*) 2 H. & T. 449.

(*f*) Post, pp. 180 *et seq.*; and cf. *Re Burbidge*, 3 Mac. & G. 1.

This resort is confined to cases in which it appears to the judge in lunacy to be "expedient," and regard will always be had to the lunatic's benefit. It does not justify the sale of a life interest of the lunatic whose income is already more than sufficient (*g*), nor a charge on an estate in remainder where, under ordinary circumstances, the lunatic would be maintained by some near relation (*h*).

Sect. 5.—*Of the Liability of the Committee of the Person to account for the Allowance for Maintenance.*

Two forms of order allowing maintenance.

Orders for maintenance are in one of two forms: (a.) the older and for a long time the only form, by which a certain sum, or it may be the whole income, is allowed for maintenance *simpliciter;* (b.) a form adopted much of late years, which allows the committee of the person such sum, not exceeding a fixed amount, as shall be actually applied for maintenance (*i*).

Allowance of sum not exceeding a fixed sum.

The latter form directly and advisably imposes upon the person who receives the sum allowed the liability to keep his accounts for maintenance; and he can be sanctioned in his expenditure only as he can show that the money has been actually employed (*k*).

Allowance of fixed sum.

On the other hand, as a general rule, the allowance of a fixed sum, or of the whole income, imposes no liability to account (*l*), the object of making the order in this form being to dispense with that liability (*m*).

(*g*) *Re Corbett*, L. R., 1 Ch. 516; cf. *Re Vavasour*, 3 Mac. & G. 275.

(*h*) *Re Pugh*, 3 De G., M. & G. 416.

(*i*) Elmer, p. 114.

(*k*) *Re French*, L. R., 3 Ch. 317; cf. *Ex parte Proctor*, 1 Swanst. 531.

(*l*) Cf. the cases in which property is given to a parent, or other person standing in *loco parentis*, with a direction for the maintenance of children. Lewin on Trusts, 138 *et seq.*; and see *Jodrell* v. *Jodrell*, 14 Beav. 411, 413; *Leach* v. *Leach*, 13 Sim. 304; *Browne* v. *Paull*, 1 Sim., N. S., 92; *Carr* v. *Living*, 28 Beav. 644; *Hora* v. *Hora*, 33 Beav. 88; *In re Weld*, 20 Ch. D. 451.

(*m*) *Re French, ubi sup.*; and cf. *Bruin* v. *Knott*, 1 Ph. 572; *In re Weld*, 20 Ch. D. 451.

Not inconsistent with the ordinary rule as to account.

This rule does not conflict with the principle that the grant of the estate of a lunatic is a grant liable to an account, even though the committee of the person may be the committee of the estate. As committee of the estate he would have to account in respect of gross income and the outgoings which make the difference between that and the net income.

Cases in which accounts directed.

Where, however, a presumption of fraud, misappropriation, or wilful negligence can be shown, or where the circumstances of the case are such that the question can be simply decided without long and complicated accounts, which it would be a hardship on the committee to require, an account will be directed (*n*).

Re French.

The authorities (*o*) were reviewed in the case of *Re French* (*p*), where it was held that, as from the visitors' report, the lunatic appeared to be well maintained, having regard to the amount allowed for the purpose, and as there was no evidence that the committee's account of his expenditure was incorrect, he was not bound nor would be ordered to account, although he admitted having applied part of the maintenance money allowed for the lunatic to augment that allowed for her infant children.

SECT 6.—*Of the Interest taken by the Committee on the Allowance for Maintenance, on the Order for it being made.*

It may be taken as clear, that when the committee maintains the lunatic and his household in pursuance of the scheme approved by the court, and expends money for that purpose, before he receives any payment from the

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(*n*) *Re Rosoman*, cit. L. R., 3 Ch. 319; *Ex parte Proctor*, 1 Swanst. 531; *Re Wood*, cit. L. R., 3 Ch. 320; *Re Jodrell*, Shelf. Lun. 182.

(*o*) See particularly *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 104; *Grosvenor* v. *Drax*, 2 Knapp, 82; *Re Ponsonby*, 2 Con. & L. 30.

(*p*) L. R., 3 Ch. 317.

lunatic's estate, he is a creditor of the estate for the amount expended (*q*).

Whether, where the order directs payment of the allowance from a particular source, a charge is created thereon, either for the benefit of the committee or to the relief of the other estate, may be considered doubtful (*r*). When real estate was not assets for the payment of debts, the ordinary order was held not to bind the estate in the hands of the heir (*s*).

Sect. 7.—*Of allowance for past Maintenance.*

The court has ample jurisdiction to make an allowance to persons who have voluntarily maintained lunatics, but it appears that in such cases the allowance will be limited to advances made within six years by analogy to the statute of limitation (*t*).

(*q*) Vide post, Bk. II. c. 1.

(*r*) See *Jones* v. *Bruce*, 11 Sim. 221. So much of the judgment in this case as did not depend on its special circumstances is cut away by the later decision of *Wentworth* v. *Tubb*, 1 Y. & C. 171.

(*s*) *Wilkinson* v. *Wilkinson*, 22 L. J., Ch. 155.

(*t*) *In re Weaver*, 21 Ch. D. 615; *In re Newbegin's estate*, 36 Ch. D. 477; *In re Rhodes*, 44 Ch. D. 94.

CHAPTER XVI.

OF THE MANAGEMENT OF THE ESTATE.

Introductory observations.

THE Court of Lunacy, in the management of the lunatic's estate, aims as far as it can to represent the lunatic himself, and supply the place in society and the state which his withdrawal has rendered void. It would, however, be neither expedient nor possible to permit the colour of individual character to enter into this representation. The character of the administration should be consistent, and for the most part uniform. Accordingly, we find in the actual practice of the court, which is, as it were, the mind and soul of the *persona* of the lunatic, as the committee is the eye and ear, mouth and hand, a definite character expressed, the character, namely, of the prudent and occasionally selfish man of the world. Traits of a more benevolent disposition have appeared in the chapter on Maintenance (*a*); but the general management is that of a man tentative and unadventurous; open-handed, to avoid probable loss; sparing, to make possible gain; supremely concerned for his own comfort, and disregardful of the interests and expectations of others; finally, so absolutely satisfied with the existing condition and probable destination of his property, that nothing but his own comfort will induce him to change either. This sketch will be illustrated in the present chapter; and first, of the several functions of the committee of the estate, the masters and the court, in regard to management.

Duties appearing on the face of the bond.

On the face of his bond (*b*) the committee is required to see the houses, buildings and structures of the lunatic well

(*a*) Ante, pp. 147 *et seq.*

(*b*) See the form of bond in the Appendix, post.

and sufficently repaired, and to preserve and keep all the deeds, evidences and writings touching his manors, messuages, lands, tenements, hereditaments and estates; but in the language of the same bond he is to observe the orders of the judge in lunacy. And Lord Truro describes the duty of the committee as consisting not merely of an obligation to attend to the management of the estate, but also of an obligation to keep the court informed of all that materially relates to the estate, and not to allow it to be administered without taking care that the court is fully apprised of what are the charges affecting it (*c*).

The committee is a bailiff and a trustee.

Regarded thus, the committee is a bailiff—not, indeed, of the lunatic, but of the crown (*d*). He has no interest in the land, no further power of distraint, for example, than a receiver (*e*). On the other hand, he is a trustee, amenable to the High Court of Justice, in the Chancery Division of which he may be called to give an account of his stewardship (*f*).

Direction of the court to be generally sought.

Under these circumstances the committee but consults prudence by confining his independent action within narrow limits, and taking the direction of the court on every act of management not absolutely trivial or matter of detail. He should regard himself as the visible link between the court and the estate, the hand to execute deeds and powers, to perform contracts and conduct operations at its

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(*c*) *Re Skingsley*, 3 Mac. & G. 221; cf. *Anon.*, 10 Ves. 103; *Ex parte Marton*, 11 Ves. 397; *Ex parte Hilbert*, ib.; *Ex parte Minor*, 11 Ves. 559; *Att.-Gen.* v. *Vigor*, 11 Ves. 563; *Re Langham*, 2 Ph. 299; *Re Brown*, 1 Mac. & G. 201. See, too, *Ex parte Parker*, 2 M., D. & D. 511.

(*d*) *Re Fitzgerald*, 2 Sch. & Lef. 437; *Drury* v. *Fitch*, Hutton, 16; *Knipe* v. *Palmer*, 2 Wilson, 130; *Winthrop* v. *Winthrop*, 1 Coop. T. L. C. 196; and cf. 4 Rep. 127 b.; *Foot* v. *Leslie*, 16 L. R. Ir. 411.

(*e*) Bradby on Distresses, by Adams, p. 62; Shelf. Lun., p. 250; *Persse* v. *Persse*, Alc. & Nap. 35; et vide sup., p. 138.

(*f*) *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 104; *Wright* v. *Chard*, 4 Drew. 673, 702; *Ex parte Gilbert*, 1 B. & B. 297; *Scammell* v. *Light*, 32 L. J., N. S., Ch. 53; cf. *Re Fitzgerald*, 2 Sch. & Lef. 438; and post, Bk. I., Pt. i. c. 19.

bidding (*g*). Thus he has no power to abandon any of the lunatic's rights without the sanction of the court (*h*).

The committee approaches the court, through the masters' office, by summons in the manner already indicated; the master certifies, if necessary, and his certificate is confirmed or not, in the usual way (*i*).

Risk of a committee acting without that direction.

If the committee acts without the sanction of the court, the expense occasioned may be thrown upon himself, whether or not the master certifies the matter to have been necessary, and whether or not the act was *bonâ fide* (*k*). But the court will sometimes direct an inquiry whether the expenditure has been beneficial, and, if so, allow it on the committee's accounts, though the cost of the inquiry must in any case be paid by the committee (*l*). Under the old practice, when an application to the court was very costly, there was great reason for showing this indulgence to the committee: now he has little excuse for not coming first to the court.

General rules applicable to management.

Four plain rules guide the court in the management of the estate.

The interests of the lunatic.

1. The interest of the lunatic himself determines all dealings with his property (*m*). This will be preferred to the interests of family or kindred, while he lives, and to the ex-

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(*g*) Conf. *Leese* v. *Martin*, L. R., 17 Eq. 224; *Re Hitchon*, 15 L. J., N. S., Ch. 126; *Re Townshend*, 2 De G., J. & S. 519; *In re Ray's Settled Estates*, 25 Ch. D. 464. See also the Lunacy Act, 1890, post, App., and *Re Wade*, 1 H. & T. 202.

(*h*) *Ex parte Wood*, 10 Ch. D. 554.

(*i*) Ante, pp. 38 *et seq.*

(*k*) Shelf. Lun. 247; *Anon.*, 10 Ves. 104; *Re Wade*, 1 H. & T. 202; *Re Brown*, 1 Mac. & G. 201; cf. *Re Taylor*, 1 Mac. & G. 210; *Re Woodcock's Trusts*, L. R., 3 Ch. 229; ante, p. 137.

(*l*) *Re Brown*, *ubi sup.*; and cf. *Re Churchill*, 3 Jur. 719; *Re Buckle*, 8 L. J., N. S., Ch. 264; *Att.-Gen.* v. *Vigor*, 11 Ves. 563. See also *Blunt* v. *Clitherow*, 6 Ves. 799; *Ex parte Marton*, 11 Ves. 397; *Ex parte Hilbert*, ib. See also *Re Langham*, 2 Phill. 277; and cf. *Selby* v. *Jackson*, 6 Beav. 192.

(*m*) See *Dormer's case*, 2 P. Wms. 265; *Ex parte Grimstone*, Ambl. 706; 4 Br. C. C. 235, note; *Ex parte Chumley*, 1 Ves. jun. 296; *Ex parte Bromfield*, 1 Ves. jun. 453; *Oxenden* v. *Compton*, 2 Ves. jun. 69; *Ex parte Baker*, 6 Ves. 8;

pectations of presumptive heirs and next of kin, of devisees and legatees. Nay, unless it can be shown that the discharge of his liabilities will at least not inconvenience the lunatic, a creditor even will not receive the assistance of the court towards the satisfaction of the debt (*n*). Permitted acts which present an apparent inconsistency with this principle are brought within it by a reasonable fiction (*o*). They are the exceptions proving the rule.

The quality of the estate.

2. The quality of a lunatic's estate will not, if possible, be changed during the continuance of his disability (*p*). If the lunatic recovers, he may reasonably expect to find his property in the same state as when he became of unsound mind. This, and not the interests of persons to become entitled after his death, is the true reason of the rule. Practically, no doubt, the rule often operates to produce the same effect as would follow from a regard for such expectations, and the principle has been at times so stated as to favour the alternative theory, but the better authority is distinctly opposed to it.

Reasonable outlay.

3. The court, in the management of the estate, will adopt reasonable precautions and contract reasonable expense for its maintenance, and, within bounds, its ordinary improvement, even where the circumstances of the lunatic

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Ex parte Phillips, 19 Ves. 123; *Ex parte Tomlinson*, 1 V. & B. 57; *Brodie* v. *Barry*, 2 Ves. & B. 36; *Re Liebenrood*, 6 Jur. 721; *Re Ashley*, 1 Rus. & M. 371; *Re J. B.*, 1 Myl. & C. 538; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672; *In re Barlow's Will*, 36 Ch. D. 287; *In re Barker*, 17 Ch. D. 241; *In re Tugwell*, 27 Ch. D. 309; *Re Pickard*, 53 L. T., N. S. 293.

(*n*) *Ex parte Hastings*, 14 Ves. 182; cf. *Re Taylor*, 3 Mac. & G. 427; ante, p. 93.

(*o*) *Ex parte Whitbread*, 2 Mer. 101, 103; ante, p. 149.

(*p*) *Ex parte Annandale*, 1 Ambl. 81; *Awdley* v. *Awdley*, 2 Vern. 192; *Ex parte Ludlow*, 2 Atk. 407; *Oxenden* v. *Compton*, 2 Ves. jun. 73; *Ex parte Whitbread*, 2 Mer. 102; *Leitrim* v. *Every*, 6 Ir. Eq. Rep. 363; cf. *Scrgeson* v. *Sealey*, 2 Atk. 413; *Ex parte Bromfield*, 1 Ves. jun. 462; *Flanagan* v. *Flanagan*, cit. ap. 1 Br. C. C. 500, 512; *Ex parte Phillips*, 19 Ves. 123; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672; *In re Ryder*, 20 Ch. D. 514; *In re Barker*, 17 Ch. D. 241; *Grimwood* v. *Bartels*, 46 L. J. Ch. 788; *Re Pickard*, 53 L. T., N. S. 293.

are not such as to make an addition to his income necessary (*q*).

Nothing speculative.

4. The court will not speculate with the lunatic's property (*r*).

Frequent illustrations of these rules will appear in the several details of management, which we now proceed to consider.

Of Details of Management of Real Estate.

1. Timber.

Cut for repairs;

There has never been any doubt but that during the lunacy the timber on the estate may be cut for purposes of repairs (*s*); and committees who had bought material for repairs when there was timber on the estate, have been required to make good the purchase-money (*t*). Coke, however, denied that the committee might cut timber except for repairs (*u*). But, though the lands and tenements of the lunatic are to be kept *sine vasto et destruccione* (*x*), this is not like the waste for which a tenant for life is impeachable, and the committee may be authorized to exercise the same powers with respect to felling timber as the lunatic could have exercised if sane (*y*). Indeed, when the timber on the estate forms part of the general rental, it is his duty to continue the usual management, and that which is suited to its circumstances. The timber, when mature, is its fair fruit, and instead of its being waste and destruction to cut it, it might be held waste and destruction not to have done so (*z*). Underwood is always

for other purposes.

When timber part of the general rental.

Underwood.

(*q*) See the cases cited, pp. 164 *et seq.* infra, on the improvement of the estate.

(*r*) *Norbury* v. *Norbury*, 4 Madd. 191; *Ex parte Calthorpe*, 1 Cox, 182; *Re Phillips*, L.JJ., 1874, June 20, *vide* post, p. 191; but see also *Ex parte Stonard*, 18 Ves. 285; *Ex parte Ellice*, Jac. Rep. 234.

(*s*) 4 Rep. 127 b; *Ex parte Ludlow*, 2 Atk. 407.

(*t*) *Ex parte Ludlow*, *ubi sup.*

(*u*) 4 Rep. 127 b.

(*x*) 17 Edw. 2, c. 10.

(*y*) *Oxenden* v. *Compton*, 2 Ves. jun. 71; *Ex parte Bromfield*, 1 Ves. jun. 461.

(*z*) *Oxenden* v. *Compton*, *ubi sup.*; cf. *Ex parte Tabbart*, 6 Ves. 428; *Ex parte Clayton*, 1 R. & M. 369.

considered as a crop, and may be cut in the usual course, as much as a crop of corn (*a*).

It may be added, that the purchase-money of timber should be paid into court (*b*). Price paid into court.

2. Mines.

Mines may, independently of any statute, be worked by the committee under the direction of the court (*c*); and when their produce forms part of the general rental, it is, it would seem, his duty to work them (*d*). Working of mines.

The letting of mines is specially provided for by the L. Act, 1890, which enacts that the judge may, by order, authorize and direct the committee of the estate of a lunatic, to grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface of the land (*e*). Letting of mines and minerals.

The profits to arise from the lease of open mines, when it is thought desirable to work them, fall into the general personal estate of the lunatic; while, in the case of unopened mines, the profits, unless applied for the maintenance of the lunatic and his family, or in some one of the objects contemplated by the 117th section, viz., the payment of debts, or costs, or the expenses of past or future maintenance, or the discharge of incumbrances, form a separate fund, impressed with the nature of realty (*f*).

(*a*) *Humphreys* v. *Harrison*, 1 Jac. & W. 582; cf. *Re Mary Smith*, L. R., 10 Ch. 79.

(*b*) *Ex parte Cranmer*, 1 Russ. 477, n. (*a*); *Ex parte Clayton*, 1 Russ. 476.

(*c*) *Ex parte Tabbart*, 6 Ves. 428.

(*d*) *Humphreys* v. *Harrison*, *ubi sup.*

(*e*) 53 Vict. c. 5, s. 120 (*e*).

(*f*) 53 Vict. c. 5, ss. 117, 123, sub-s. (2). It appears that under the above sections the court is empowered to authorize and confirm contracts of a similar nature made, not merely without its authority, but even before the proprietor, though indisputably a lunatic, has been so found by inquisition. *Re Mary Smith*, L. R., 10 Ch. 79; cf. *Re Wynne*, L. R., 7 Ch. 229.

3. Repairs and Improvements.

Ordinary repairs.

Ordinary repairs will usually fall within the minor details of management, but the court will not permit committees to apply the fund intrusted to them in repairs to any considerable extent without a previous application (*g*). Where the court will draw the line between a warrantable and an unwarrantable exercise of discretion, it is perhaps not easy to say. In one case, already alluded to (that of a receiver), 30*l.* was fixed as the limit for unauthorized expenditure (*h*).

Extraordinary repairs.

Surveyor's estimate.

Contract.

On application for repairs to a large amount, the master in lunacy usually desires to have the report and estimate of a surveyor or architect, setting forth the condition of the buildings in question, specifying the repairs wanted and estimating the expense. If the master in lunacy approves of the application, he also, before making his certificate, asks that a contract, if the work can be properly contracted for, be entered into, pledging the contractor to do the work specified, for the sum named, in a workmanlike manner and to the satisfaction of the surveyor or architect. The timber for the execution of the repairs, if there be any on the estate available for the purpose, should not be purchased (*i*); all other costs of ordinary and necessary repair, and the cost of timber when there is none on the estate, will fall upon the rents and profits as part of the general expense of management (*k*).

Timber should come from the estate.

Improvements and considerable repairs.

On the other hand, improvements may, and indeed generally will, be regarded as something outside the province of general management, and repairs themselves may be so considerable as to amount to improvements, as, for

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(*g*) *Ex parte Marton*, 11 Ves. 397; *Ex parte Hilbert*, ib.; *Anon.*, 10 Ves. 104; *Att.-Gen.* v. *Vigor*, 11 Ves. 563; but see *Blunt* v. *Clitherow*, 6 Ves. 799.

(*h*) See Dan. Ch. Pr. 1700, n. (*m*).

(*i*) 4 Rep. 127 b; *Ex parte Ludlow*, 2 Atk. 407; *Oxenden* v. *Compton*, 2 Ves. jun. 69, 260.

(*k*) *Re Badcock*, 4 Myl. & C. 440; cf. *Sergeson* v. *Sealey*, 2 Atk. 414; per Hardwicke, C.; Lewin on Trusts, pp. 965 *et seq.*

example, where an entire house needs to be rebuilt (*l*); the expense of such repairs and improvements will in proper cases be thrown upon the real estate, the sum taken and expended being considered as a charge thereon (*m*). In *Re Clarke*, Lord Cottenham seems to have thought that more liberality might have been shown in the improvement of the estate at the expense of the personalty, where the person next entitled was a son, than where he was more remotely connected (*n*).

Cost, how borne.

The L. Act, 1890, adopts this principle in providing that the judge may order that the whole or any part of any moneys expended or to be expended for the permanent improvement, security or advantage of the property of the lunatic, or of any part thereof, shall, with interest, be a charge upon and raiseable out of the lunatic's estate and interest in the land or the particular part thereof (*o*). Under this section, where the lunatic is a limited owner of settled estates and also entitled to other property absolutely, the expenses of repairs on the settled estates will be ordered to be raised by mortgage of those estates exclusively (*p*).

Provisions of L. Act, 1890.

No right of sale or foreclosure during the lifetime of the lunatic can be given or acquired under or by virtue of the charge; and the interest is to be kept down during the lifetime out of the income of his personal estate so far as the same is able to bear it. The charge may be made either to the person advancing the money, or, if the money is paid out of the lunatic's general property, to some person as trustee for him, and as part of his personalty (*q*).

(*l*) *Re Child, Re Harris*, cit. ap. Shelf. Lun., p. 276; cf. *Re Clarke*, 2 Phill. 282; *Re Skingsley*, 3 Mac. & G. 221.

(*m*) Cf. *Re Harris, Re Clarke, ubi sup.*, for cases before the act.

(*n*) 2 Phill. 282.

(*o*) 53 Vict. c. 5, s. 118.

(*p*) *In re Gist*, 5 Ch. D. 881; *In re Vavasour*, 29 Ch. D. 306.

(*q*) Ib.; and see *Re Clarke, ubi sup.* In the absence of a charge, before the statute, the heir at law was held entitled to be admitted to the estate without any allowance being made for the improvements made by the committee. *Foster* v. *Marchant*, 1 Vern. 262; 1 Eq. Cas. Abr. 277; and cf. *Ex parte Hilbert*, 11 Ves. 397.

The statutes directed to the improvement of landed estates contain, expressly or by reference, provisions for the mental disability of the proprietor. Such are the Drainage Act of 1845 (*r*); the Public Money Drainage Act (*t*); the Private Money Drainage Act (*u*); the Improvement of Land Act (*x*); the Landed Owners Residences Act, 1870 (*y*); the several Inclosure Acts (*z*); Settled Estates Act, 1877 (*a*); Agricultural Holdings Act, 1883 (*b*); Settled Land Act, 1882 (*c*); Extraordinary Tithe Rent-charge Redemption Act, 1886 (*d*).

4. The Discharge of Incumbrances (*e*).

Tithes. Land tax. Leave of the court to be obtained by the committee.

The committee may act on behalf of the lunatic for the commutation of tithes (*f*), and the redemption of the land tax (*g*). Before, however, he proceeds to the sale or mortgage of any part of the lunatic's estate, with a view to redemption of the land tax, he must, notwithstanding the wide powers conferred by the acts, obtain the sanction and direction of the court (*h*).

Other charges.

These, however, are not the only incumbrances which

(*r*) 8 & 9 Vict. c. 56, repealing a prior act for the same purpose, 3 & 4 Vict. c. 55.

(*t*) 9 & 10 Vict. c. 101; explained and amended by 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; and 19 & 20 Vict. c. 9.

(*u*) 12 & 13 Vict. c. 100; amended by 19 & 20 Vict. c. 9.

(*x*) 27 & 28 Vict. c. 114.

(*y*) 33 & 34 Vict. c. 56, to be read with 27 & 28 Vict. c. 114; amended by 34 & 35 Vict. c. 84.

(*z*) 41 Geo. 3, c. 109; see also 3 & 4 Will. 4, c. 87; 3 & 4 Vict. c. 31; but particularly 8 & 9 Vict. c. 118; amended and extended by 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; and 31 & 32 Vict. c. 89; and continued by 14 & 15 Vict. c. 53; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 81; and 25 & 26 Vict. c. 73.

(*a*) 40 & 41 Vict. c. 18.

(*b*) 46 & 47 Vict. c. 61.

(*c*) 45 & 46 Vict. c. 38.

(*d*) 49 & 50 Vict. c. 54.

(*e*) See Shelf. Lun., pp. 259, 260.

(*f*) 6 & 7 Will. 4, c. 71, ss. 15, 48.

(*g*) 42 Geo. 3, c. 116, ss. 14, 53; and see Bythewood's Conv., 3rd ed., vol. 9, p. 626.

(*h*) *Re Wade*, 1 H. & T. 202; and cf. *Re Taylor*, 1 Mac. & G. 210.

the court will think it advisable to remove. In proper cases it will also redeem charges created by the lunatic himself, or by those from whom he has derived the estate. Such cases would be those, for example, in which the interest payable on the mortgage is greater than the surplus income of the estate (*i*), or greater than the interest derived from the fund which might be applied in its discharge; or, again, where there is timber on the estate which, in the due course of administration, might be felled (*k*).

Provisions of L. Act, 1890.

The discharge of incumbrances is one of the objects for which, under the L. Act, the property of the lunatic is permitted to be mortgaged or sold (*l*).

Costs of redeeming charges, how borne.

The books exhibit a strange conflict of opinion as to whether the discharge of incumbrances should enure for the benefit of the real estate or not, and the time at which this question should be decided (*m*). The following rules may be taken to represent the modern state of the law on the subject:—

(a.) The court will usually, at the time of the discharge of the incumbrance, declare the expenditure a charge on the particular property for the benefit of the general personalty, and direct a mortgage to some person as a trustee to preserve the charge (*n*).

(b.) In doubtful cases the court will leave the question open, without prejudice to either interest, by directing a transfer to a trustee, upon trust for the lunatic, his heirs and assigns, or the lunatic, his executors, administrators or assigns, as the judge in lunacy, or the High Court,

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(*i*) *Ex parte Digby*, 1 J. & W. 640.

(*k*) *Ex parte Phillips*, 19 Ves. 118.

(*l*) 53 Vict. c. 5, s. 117.

(*m*) See *Lord Leitrim* v. *Emery*, 6 Ir. Eq. Rep. 357, 365; *Newcombe* v. *Newcombe*, 3 Ir. Eq. Rep. 414; *Ex parte Grimstone*, Ambl. 706; *Ex parte Phillips*, 19 Ves. 118, 123; *Ware* v. *Polhill*, 11 Ves. 257; *Ex parte Digby*, 1 J. & W. 640; *Ex parte Hinde*, Ambl. 706, n.; *Wild* v. *Tew*, 1 Beatty, 266; Shelf. Lun., p. 306.

(*n*) 53 Vict. c. 5, s. 118; Elmer, p. 204.

in any action to be instituted for the purpose, may direct (*o*).

(c.) Where the question is neither decided by declaration of a charge nor expressly reserved, the person entitled after the death of the lunatic takes the estate as he finds it, discharged from the incumbrance (*p*).

5. Leases and their Incidents.

Letting from year to year.

It is said to be, not merely in the power, but the duty of the committee to let the lunatic's land from year to year where it is proper to be so let (*q*); and though no statutory or judicial authority is adduced for the practice it is supported by the analogy of a receiver (*r*).

Committee cannot grant a lease.

But a committee cannot, on his own responsibility, grant a lease of the lunatic's land; and if he affects to do so he may be made liable for any loss which may occur, as well as for the costs incurred to inquiries whether or not loss has occurred (*s*).

The court itself cannot, independently of statutory powers, lease the lunatic's lands except during his life and lunacy (*t*). Moderate powers of leasing were given by 43 Geo. 3, c. 75, and from time to time amended and increased.

Statutory powers of leasing.

By the L. Act, 1890, the judge may by order authorize and direct the committee of the estate of a lunatic to grant leases of any property of the lunatic for building, agricultural, or other purposes. Leases authorized to be granted and accepted under the act may be for such number of

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(*o*) *Re Leeming*, 3 De G., F. & J. 43; and cf. *Ex parte Digby*, 1 J. & W. 640; Shelf. Lun., p. 306; *In re Melly*, 31 W. R. 898.

(*p*) *Ex parte Grimstone*, Ambl. 706; *Newcombe* v. *Newcombe*, 3 Ir. Eq. Rep. 414; *Lord Leitrim* v. *Emery*, 6 Ir. Eq. Rep. 357; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672; *In re Ryder*, 20 Ch. D. 514; *In re Barker*, 17 Ch. D. 241; *Re Pickard*, 53 L. T., N. S. 293.

(*q*) Elmer, pp. 63, 119.

(*r*) Ante, p. 139.

(*s*) *Re Wilkins*, 6 Jur. 308.

(*t*) *Ex parte Dikes*, 8 Ves. 79; *Re White*, 21 L. T. 82; *Re Dyneby*, ib.; *Re Davies*, *Re Stephenson*, Shelf. Lun., pp. 438, 439.

lives or such term of years, at such rent and royalties, and subject to such reservations, covenants and conditions, as the judge approves (*u*).

Extend to enable court to confirm an arrangement.

The corresponding sections of the act of 1853 have been held to give the court jurisdiction to confirm an arrangement entered into without its sanction. In *Re Wynne*, a gentleman informally agreed with the committee's agent to take a lease of part of the estate for three years. The master was not applied to, the tenant was let into possession and spent a large sum in repairs and improvements; nearly ten months after the committee gave him six months' notice to quit, upon which he applied by petition in the matter of the act to have the terms of his arrangement with the agent carried into effect. The court decided that it had jurisdiction, and made the order accordingly (*x*).

Lord Eldon refused to allow building leases for 999 years (*y*); but such a lease may be granted (*z*).

Mines.

(b.) Again, by sect. 120 (*c*), leases of opened and unopened mines may be granted, as already stated.

Lunatic tenant in tail.

A doubt having arisen as to the ability of the lord chancellor in lunacy under the L. R. Act, 1853, to empower the committee of a lunatic tenant in tail to grant leases which would bind his issue in tail and remaindermen, an amending act (18 Vict. c. 13) was passed, which is now repealed by the L. Act, 1890, which later act provides, by sect. 122, that the power to authorize leases of a lunatic's property under the act shall extend to property of which the lunatic is tenant in tail, and every lease granted pursuant to any order under the act shall bind the issue of the lunatic, and all persons entitled in remainder and reversion expectant upon the estate tail of the lunatic, including the crown, and every person to whom from time to time the reversion expectant upon the lease belongs upon the death of the lunatic, shall have the same rights

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(*u*) 53 Vict. c. 5, s. 120 (*d*), and cf. s. 122.

(*x*) *Re Wynne*, L. R., 7 Ch. 229.

(*y*) *Re Starkie*, 2 Russ. 197.

(*z*) 53 Vict. c. 5, ss. 120 (*d*), 122; Elmer, p. 64.

and remedies against the lessee, his executors, administrators, and assigns, as the lunatic or his committee would have had.

Powers of leasing, how exercised.

(c.) When a lunatic has a limited estate only in land, including leaseholds, and any power of leasing the same is vested in him, the committee of the estate may, in the name and on behalf of the lunatic, under order of the judge in lunacy, execute the power (*a*).

Destination of fines, &c.

Fines, or other payments on the renewal of leases, may be paid out of the lunatic's estate, or charged with interest on the leasehold property (*b*). All fines, premiums, and sums of money received upon the grant or renewal of a lease, where the property was real estate, shall, subject to the application thereof for any purposes authorized by the L. Act, as between the representatives of the real and personal estate of the lunatic, be considered as real estate, except in the case of fines, premiums, and sums of money received upon the grant or renewal of leases of property of which the lunatic was tenant for life, in which case the fines, premiums, and sums of money shall be personal estate of the lunatic (*c*).

Applications as to leases.

The masters will, as a matter of course, receive applications and conduct any inquiry with respect to the setting and letting of the estate (*d*). On an application of this kind being made to them, one of them, on being attended by the solicitors for the necessary parties, will consider the application and the evidence in support of it. This evidence consists of affidavits as to the nature and value of the property, the respectability of the proposed tenant and the like. From this and such other evidence as he may require the master will make his certificate, and if he finds that it will be for the benefit of the lunatic and his estate that the lease should be granted, he will settle and approve of the agreement for the proposed lease. On the confir-

Certificate.

(*a*) 53 Vict. c. 5, s. 120 (*h*). See also Settled Land Act, 1882, s. 62.

(*b*) 53 Vict. c. 5, s. 123, sub-s. (2).

(*c*) 53 Vict. c. 5, s. 123, sub s. (2).

(*d*) R. L. 1890, 31.

mation of the certificate an order will be made approving the agreement, and the masters will then settle a proper lease in pursuance of the order and sign their allowance of the lease when settled, and the committee of the estate will, in the name and on behalf of the lunatic, execute the lease when allowed, upon the intending lessee executing a counterpart thereof (*e*).

Costs.

It is usually further referred to the taxing masters to tax the committee and next of kin their costs incurred in the application; which, after being taxed, will be ordered to be paid by the committee out of the fine received upon the lease, if any, or the rents and profits of the lunatic's estate. The costs of the lease are, of course, paid by the lessee (*f*).

The committee not eligible as lessee.

The committee of the estate himself is probably the only person of substance and respectability to whom a lease would be refused by the court (*f*). Even where the committee was entitled to the property next in remainder expectant upon the death of the lunatic, a lease for the joint lives of himself and the lunatic was refused, though he was allowed to occupy at a specified rent, and upon specified conditions, until further order (*g*).

Letting by auction.

The practice of letting by auction, once not uncommon (*h*), was condemned by Sir A. Hart, C., as pressing hardly on the old tenant, being wasteful to the estate and prejudicial to the heir (*i*), and is believed to be rare in the present day.

Leases and Sales of Settled Estates Act.

The case of lunacy is expressly provided for under the Leases and Sales of Settled Estates Acts, whether existing in the person to make an application, or to give a consent, or to exercise any other power under the act, the

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(*e*) R. L. 1890, 122. The committee executes by signing the lunatic's name by Y. Z., the committee of the estate; see *Lawrie* v. *Lees*, 17 App. Cas. 19, where the committee signed in his own name only.

(*f*) *Ex parte Prickett*, 3 Swanst. 130; Elmer, p. 63.

(*g*) *In re Sir T. Smyth*, cit. ap. Shelf. Lun., p. 446.

(*h*) Shelf. Lun., p. 444; *Re Portsmouth*, cit. ib.

(*i*) *Re Ball*, 1 Moll. 141.

committee being empowered to act on behalf of such persons (*k*).

Acceptance of surrenders and renewal.

The Lunacy Act, 1890, follows earlier acts (*l*) in making provision also for the acceptance of surrenders and the renewal of leases on behalf of the lunatic. By the 120th section it is enacted that the judge may by order authorize and direct the committee of the estate to surrender any lease and accept a new lease (*m*). Leases authorized to be granted and accepted by or on behalf of a lunatic under the act may be for such number of lives or such term of years, at such rent and royalties, and subject to such reservations, covenants and conditions as the judge approves (*n*).

Destination of fines, &c.

All fines, premiums and sums of money received upon renewal will, as between the representative of his real and of his personal estate, be considered as real estate, unless the lunatic be tenant for life only, and then the same will be considered as personal estate (*o*).

Procedure to obtain renewal.

The tenant desiring a renewal of his lease should in the first instance apply to the committee of the lunatic, instead of making the application to the court himself; otherwise, although his application may be granted, he may find himself saddled with the costs of the application, and of all proceedings thereunder (*p*). Should the committee, when applied to, refuse or neglect to inform the court, the tenant would be justified in applying on his own part, and the court would deal with the costs as it might think proper. Even where there is a receiver and he makes the application, the concurrence of the committee is required (*q*). In the ordinary way, and subject to any special agreement between the parties, it seems to be the rule that the additional expenses occasioned by the disability of the lunatic

Costs.

(*k*) Post, Bk. II. c. 7, s. 1.

(*l*) 11 Geo. 3, c. 20; 11 Geo. 4 & 1 Will. 4, c. 65; 16 & 17 Vict. c. 70, s. 134.

(*m*) 53 Vict. c. 5, s. 120 (*f*).

(*n*) 53 Vict. c. 5, s. 122, sub-s. (2).

(*o*) 53 Vict. c. 5, s. 123, sub-s. (2).

(*p*) So with 'abatement of rent,' post, p. 173; and *Re Fitch*, 1 R. & M. 354; *Ex parte Town*, T. & R. 137.

(*q*) *Ex parte Prickett*, 3 Sw. 130.

in respect of the lease are borne by the lunatic's estate; the expenses of the lease and counterpart are borne by the lessee; but special arrangements are usually made (*r*).

Distress.

Whether the committee has or has not the right of distraining without order for rents due to the lunatic's estate, where these have been in arrear for more than a year, is, like the similar question in relation to receivers, to which reference has been already made, a question of some doubt (*s*). It does not appear to have been usual to obtain an order for the purpose. But it is quite certain that the committee has no authority without order to make any abatement in the rents. Such an abatement is from time to time made, on certificate of the master that the estate will be benefited thereby (*t*), but the application must proceed from the committee of the estate; and it is even said that Lord Brougham, following the example of Lord Eldon, had on several occasions dismissed petitions for the reduction of rents because they were presented by tenants (*u*).

Abatement of rent.

Relief from action for recovery of land.

A tenant has, however, on his own application, been relieved against an ejectment founded on a forfeiture on breach of covenant to repair, upon completion of the repairs and payment of all costs incurred by the lunatic's estate in conse-

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(*r*) Ib.; *Ex parte Barnes*, 17 L. J., N. S., Ch. 436; and see *Grissell* v. *Robinson*, 3 Sc. 329; *Webb* v. *Rhodes*, 3 Bing. N. R., 732; Elmer, p. 64.

(*s*) Ante, p. 138. As to the liabilities of committees for not enforcing payment of rent, see *Ex parte Swindell*, 21 L. J., N. S., Ch. 748.

(*t*) *Re Potter*, 1828, Dec. 24; *Re Drax*, 1828, Jan. 25; and see *Ex parte West*, Turn. & R. 137, n. In one case an abatement in the rent was directed without a reference where the application was supported by a strong affidavit of the committee, in which he stated, that in his judgment the abatement was reasonable and necessary; that similar abatements had been made generally in that part of the country; and that the particular tenant had from the pressure of the times got into arrears, but was highly respectable. The evidence before the court was exactly the same as would have been tendered in the masters' office, and the abatement proposed was only 60*l*. *Re Fitch*, 1 Russ. & M. 354. Now the application would be made in the master's office in the first instance. Ante, p. 34.

(*u*) *Ex parte Town*, Turn. & R. 137; *Re Fitch*, 1 Russ. & M. 355, n.

quence of the breach of covenant and the action of ejectment. Here, however, the committee had already taken the initiative in a manner adverse to the interests of the tenant (*x*).

Jurisdiction of the judge in lunacy to decide between committee and tenants.

Where legal proceedings are necessary, the previous leave of the court must be obtained by the committee (*y*); but the judge in lunacy has in some cases himself exercised a jurisdiction as well over as on behalf of the tenants of the lunatic. Thus, on the application of the committee, tenants have been restrained from cutting timber and from committing waste on lands in their occupation (*z*); while, on the other hand, persons claiming as heirs at law and next of kin of the lunatic have been restrained after his death on a like application from proceeding in a distress for arrears of rent, and from taking any proceedings under replevin bonds, and from distraining on the tenants of the lunatic's freehold estate until further order (*a*).

6. Manors.

Committee cannot grant copyhold estates.

When the estate of the lunatic includes a manor, the committee cannot grant the copyholds, for he has by law no estate in the manor and is not the lord (*b*). Nor is there any common law or statutory power enabling him to do so with the sanction of the court. Nevertheless, as the copyholder does not derive his estate out of the interest of the lord of the manor only, but the essence of the copyhold is the custom of the manor, when a grant is made by a lord who has a lawful estate or interest, the lord being considered as an instrument only to grant, the copyholder is in by the custom of the manor without regard to the extent of such estate or interest or the capacity of the grantor (*c*).

(*x*) *Ex parte Vaughan*, Turn. & R. 434.

(*y*) Post, Bk. II. c. 9, s. 1.

(*z*) *In re Frank*, Shelf. Lun. 449; *In re Creagh*, 1 Ball & B. 108; *In re Chinnery*, 1 Jones & L. 90.

(*a*) *In re Grove*, Shelf. Lun. 449.

(*b*) *Blewit's case*, Ley, 47; Vin. Abr. Cop. (G), pl. 15; 1 Watk. on Cop. 24; Scriven on Cop. 75, ed. 6.

(*c*) Co. Cop. s. 34; 4 Rep. 23 b; 8 Rep. 63 b; Vin. Abr. Cop. (G), pl. 18; Gilb. Ten. by Watk. 255; 1 Watk. Cop. 24; Scriv. Cop. 75 ed. 6.

Grant by lunatic lord valid.

So by lunatic steward.

So that if a lord be of unsound mind, such grants, surrenders and admittances of and to copyholds held of the manor as are warranted by the custom of it will be good, notwithstanding the mental disability of the lord (*d*). And the same is true in the case of a steward subject to a similar disability. The law, said Sir E. Coke, is not very curious, in examining the imperfections of the steward's person, and if he be *non compos mentis*, lunatic or idiot, yet what things soever he performs, as incidental to his place, can never be avoided for any such disability, because he performs them as a judge, or, at least, as custom's instrument (*e*).

Grant of copyholds should be made by the steward.

Thus, the grants, surrenders and admittances of and to copyholds belonging to a lunatic's manor, should be made, accepted and granted by the steward of the manor for the lord. It has, however, been ordered, in a case where it was the custom of the manor to grant copyholds for lives, that the steward should not make any grants without the privity of the committee and the sanction of the court (*f*).

Appointment of the steward.

Where no steward has been appointed before the commencement of the lord's disability, or a vacancy has since occurred in the office, the masters will, on the application of the committee of the estate, be directed to appoint a steward until further order. The steward should be a solicitor; he gives security by recognizance, touching the rents and profits of the manor, in much the same manner as a receiver (*g*).

Commutation.

Enfranchisement.

For the way in which the lord of the manor is represented, in case of commutation or enfranchisement, the reader is referred to a later chapter (*h*).

(*d*) Co. Cop. s. 45; Tr., p. 104, 105; 1 Watk. Cop. 255, and also ed. iv. v. 2, p. 18 (n.); Scriv. Cop. 21, ed. 6; cf. *Scambler's case*, Cro. Eliz. 637.

(*e*) Co. Cop. s. 45.

(*f*) *Blewit's case*, Ley, 47.

(*g*) *Re Smyth*, cit. ap. Shelf. Lun., p. 264; Elmer, p. 77; ante, p. 135.

(*h*) See Bk. II. c. 7, s. 4, post.

7. Advowson.

Committee cannot present.

The committee of the estate cannot again, either with or without the sanction of the court, present to a church, of the advowson of which the lunatic is seized (*i*). Since Lord Talbot's time, the lord chancellor has himself exercised the right of presentation, though generally in favour of some member of the lunatic's family (*k*). And in the same way the visitorial powers of the lunatic, in the case of a charity, are executed by the lord chancellor, and all applications, in respect of the management of the charity, must be made to him and not to the committee (*l*).

Visitorial powers.

8. Copyhold Estates.

Lunatic cannot forfeit.

The lunatic tenant of copyhold estates seems curiously enough at all times to have held a rather favoured position; and even before legislation on the subject could not, it is said, have committed a forfeiture of his copyhold (*m*). At the same time the committee was bound, when the estate was subject to services, or held upon conditions, to tender the services or perform the conditions so as to prevent the chance of a forfeiture, and the law, with an exception to its general rule, permitted even a stranger to perform such offices of humanity (*n*).

Committee should perform services, &c.

11 Geo. 4 & 1 Will. 4.

The statute 11 Geo. 4 & 1 Will. 4, c. 65, first made direct provision for the admittance of lunatics to any copyhold, to which they might become entitled, and for payment of the fines to the lord of the manor, of which such lands

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(*i*) Com. Dig., Idiot (C).

Qu. where the lunatic had been before the lunacy of the Roman Catholic faith, and the last presentation to the rectory had devolved on the university of Oxford, in case of the living becoming vacant during the lunacy, would the right of the lord chancellor or of the university prevail? *Re Varasour*, 3 Mac. & G. 275.

(*k*) 1 Wood, Lect., p. 409; Shelf. Lun., pp. 12, 21.

(*l*) *Att.-Gen.* v. *Dixie*, 13 Ves. 519, 533: and see Lewin on Trusts, 530.

(*m*) Co. Cop. s. 59; 1 Watk. Cop. 337; Scriv. Cop. 186, ed. 6. Shepp. Ct. Keeper, c. 22.

(*n*) Co. Litt. 206 b; Vin. Abr. Condition, K a, pl. x.

might be holden (*o*); this act was repealed, and its provisions reproduced in an amended form, by the Lunacy Regulation Act, 1853, and are now contained in the Lunacy Act, 1890. L. R. Act, 1853, and L. Act, 1890.

By this latter act it is provided, that where a lunatic is entitled to be admitted tenant of copyhold land, the committee of his estate may appear at one of the three next courts holden for the manor (for the holding whereof the usual notice should be given), and there offer himself to be admitted tenant, in the name and on the behalf of the lunatic; and in default of his appearance or acceptance of admittance, the lord or his steward may, after three courts duly holden, and proclamation thereat regularly made, at any subsequent court appoint any fit person to be attorney for the lunatic for that purpose only; and by that attorney admit the lunatic tenant of the land according to such estate as the lunatic shall be legally entitled to therein (*p*). Duty of committee prescribed. Appointment of attorney in default of committee appearing.

The lord or his steward may, upon the admittance, impose such fine as might have been legally imposed if the lunatic had been of sound mind, which fine may be demanded by the lord's bailiff or agent, by a note in writing, signed by the lord or his steward, to be left with the committee of the estate, or with the tenant or occupier of the land (*q*). Fine, how obtained.

If the fine be not paid or tendered to the lord or his steward, within three months after demand, then the lord may enter upon and hold the land, and receive the rents and profits thereof (but without liberty to fell any timber standing thereon), until he be thereby fully paid the fine with his reasonable costs and charges of raising the same, and of obtaining the possession of the land, although the lunatic die before the fine and costs and charges have been raised (*r*). The lord shall yearly, on demand by the person entitled to the surplus rents and profits, after payment of Lord may enter for fine.

(*o*) See particularly ss. 3, 5, 6, 8 and 9.
(*p*) 53 Vict. c. 5, s. 125.
(*q*) Ib. s. 126, sub-s. (1).
(*r*) Ib. s. 126, sub-s. (2).

the fine and costs and charges, or by the person then entitled to the land, render an account of the rents and profits received by him or on his behalf, and shall pay the surplus, if any, to the person entitled thereto (*s*). As soon as the fine and costs and charges have been fully paid, or if, after the lord's entry, the fine and costs and charges be lawfully tendered to him, then the lunatic, by the committee of the estate or other the person entitled, may enter upon and hold the land according to his estate or interest therein, and the lord shall deliver possession thereof accordingly. And if he refuse so to do, he shall make satisfaction to the person out of possession for all the damages he shall thereby sustain, and all his costs and charges of recovering possession (*t*).

Indemnity of committee paying the fine.

If the committee pays the fine and costs and charges, then he, his executors or administrators, may enter upon and take the land, and receive the rents and profits thereof until payment thereout of the amount disbursed upon that account, although the lunatic die before reimbursement (*u*).

Unlawful fines.

If the fine imposed be not warranted by the custom of the manor, or be unlawful, the lunatic may controvert its legality, as if the act had not been made.

No forfeiture.

Finally, no lunatic so found is to forfeit any copyhold land for neglecting or refusing to appear at any court, or for neglecting to be admitted, or to pay any fine for his admittance (*x*).

For the enfranchisement of copyholds under the statutory provisions the reader is referred to a later chapter (*y*).

9. Leasehold Estates.

By the L. Act, 1890, following the previous practice of the court (*z*), as consolidated in 11 Geo. 4 & 1 Will. 4,

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(*s*) 53 Vict. c. 5, s. 126, sub-s. (3).
(*t*) Ib. s. 126, sub-s. (4).
(*u*) Ib. s. 126, sub-s. (5).
(*x*) Ib. s. 126, sub-s. (6).
(*y*) Post, Bk. II, c. 7, s. 4.
(*z*) 29 Geo. 2, c. 31; and cf. *Ex parte Phelps*, 9 Mod. 357; *Ex parte Jermyn*, 3 Sw. 131; *Re Portsmouth, Re Birch*, Shelf. Lun., pp. 451, 452.

c. 65 (*a*), it is provided that the judge may by order authorise and direct the committee of the estate to surrender any lease and accept a new lease. The new lease will be for such number of lives or such term of years, at such rent and royalties, and subject to such reservations, covenants, and conditions as the judge approves (*b*).

The application should be made to the master in the first instance, and supported by a regular deduction of the title-deeds and evidence establishing the devolution of the lease upon the lunatic, and such evidence as the master may require must be produced. Thereupon the master will certify, and the certificate will be confirmed or not in the usual way.

Fines, &c. how paid.

Fines or other payments on the renewal of leases may be paid out of the lunatic's estate, or charged with interest on the leasehold property (*c*).

Trusts, &c. preserved.

Any renewed lease is to be to the same uses, and be subject to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the surrendered lease was subject to, or would have been subject to, in case such surrender had not been made (*d*). Even before this enactment the court preferred not to change the estate, and if the lease had stood in the names of trustees before surrender, would order it to be renewed in the names of trustees (*e*).

Committee cannot renew for his own benefit.

It is needless to add that committees are like trustees in this respect, that if they renew a lease for their own benefit they commit a breach of trust and render themselves liable to be removed (*f*).

Power to sell leases.

The judge may, by order, authorize and direct the

(*a*) See particularly ss. 13, 14, 15. The practice was the same under the now repealed L. R. Act, 1853, ss. 113, 114, 115.

(*b*) 53 Vict. c. 5, s. 120 (*f*), 122, sub-s. (2).

(*c*) Ib. s. 122, sub-s. (3).

(*d*) Ib. s. 121.

(*e*) *Ex parte Jermyn*, 3 Sw. 131 ; *Re Portsmouth, ubi sup.*

(*f*) Cf. *Ex parte Phelps*, 9 Mod. 357 ; and Lewin on Trusts, pp. 847, 965, 966.

committee to sell any property belonging to a lunatic, under which power he could dispose of undesirable leases or underleases (*g*).

10. Sale.

The court of lunacy will not at random or without good reason allow so important a charge to be made in the nature of a lunatic's estate as is implied in the sale of any part of his property. There are, however, many circumstances which may render it desirable that the lunatic's property should be sold: and by the practice of the court and statutory enactment sundry powers have been conferred for this purpose. These range themselves under five convenient divisions, viz. :—

1. Powers of sale for objects of which there is also a power of mortgaging.
2. Powers of sale for objects of which there is also a power of leasing.
3. Powers of sale for which there is also an alternative power of partition.
4. Powers of sale where the property is of an unprofitable or speculative character.
5. Powers of sale in cases where the interests of society are treated as so completely paramount to those of the individual that even persons under no disability have no option but to consent and do their part in carrying out the sale of their property for purposes conducing to those interests.

Of these several divisions in their order :—

11. Sale and Mortgage.

Previously to 43 Geo. 3, c. 75, there was no power to sell or charge the lunatic's estates (*h*). The provisions of

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(*g*) 53 Vict. c. 5, s. 120 (*a*), and post, p. 186.

(*h*) *Ex parte Smith*, 5 Ves. 553 ; *Ex parte Dikes*, 8 Ves. 79, *a* ; *Re Halforde*, 1 Jur. 524 ; *Ex parte Birch*, 3 Sw. 98 ; a committee has no power of himself to incumber at all. *Foster* v. *Marchant*, 1 Vern. 262.

that act have been adopted and amended by subsequent legislation and are now represented as follows :—

Statutory powers of sale and mortgage.

By the L. Act, 1890, s. 117, the judge is empowered to order that any property of the lunatic whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as he thinks most expedient, for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following :—

1. The payment of the lunatic's debts and engagements.
2. The discharge of any incumbrance on his property.
3. The payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit (*i*).
4. The payment of or provision for the expenses of his future maintenance.

Costs.

It is to be observed in connexion with this subject that the costs of all proceedings in the matter of a lunatic are in the discretion of the judge in lunacy, who may order all or any of such costs to be paid by the lunatic, or to be charged upon and paid out of his estate, or such part thereof as the judge thinks fit, or by any other party to the proceedings (*k*).

With respect to these sections, it may be observed—

Sale or charge must appear to the judge in lunacy to be just and reasonable and for the lunatic's benefit.

1. That the sale or charge must appear to the judge in lunacy to be just and reasonable or for the lunatic's benefit. Thus in a case where a father, who was committee of the lunatic, was tenant for life of estates worth 4,000*l.* per annum, and the allowance considered proper for the lunatic, who was tenant in tail in remainder, was 250*l.* per annum ; a petition that the allowance during the life of the father might be charged on the estate in remainder was refused, it being held that in the absence of special circumstances such a proposal was neither just nor reasonable (*l*). Again,

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(*i*) *In re Fox*, 33 Ch. D. 37, where see the form of order, post, p. 182.

(*k*) 53 Vict. c. 5, s. 109.

(*l*) *Re Pugh*, 3 De G., M. & G. 416 ; *In re Fox*, 33 Ch. D. 37.

although the court cannot prevent a creditor from proceeding to his legal remedy against a debtor because his debtor happens to be a lunatic, unless, indeed, he has by his act rendered himself in any way amenable to the jurisdiction of the court, the court will not help him by directing the sale or mortgage of the estates of the lunatic, where the payment of the debts would leave the debtor without adequate means of sustenance, the principle, indeed, being the same as regulates the payment of the lunatic's debts generally (*m*).

The sale or charge must be confined to the object specified in the section.

2. That the application of section 117 is strictly confined to the objects expressly authorized. Thus, the words, the expenses of future maintenance, have been held not to justify a sale of a life interest to the reversioner, where the income of the lunatic was already more than sufficient for maintenance (*n*). So, under the corresponding section of 11 Geo. 4 & 1 Will. 4, c. 65, the sale of the next presentation to a rectory, of the advowson of which the lunatic was tenant in tail in possession, was not permitted, there being no object for the sale within the provisions of the act (*o*). The mere fact, however, that the object might be obtained in other ways will not prevent its appearing just, reasonable and proper to exercise the power (*p*).

In the case of *In re Fox* (*q*), the court authorized the committee to concur with a person who was co-owner with the lunatic of real estate, in a mortgage of the property to pay debts, the mortgage being so framed that the lunatic's share was only liable for one moiety of the debt, but the court declined to authorize the committee to enter into any covenant on behalf of the lunatic.

Lunatic tenant in tail.

Where the lunatic is tenant in tail, and it becomes necessary to bar the entail for the purpose of a mortgage,

(*m*) *Ex parte Hastings*, 14 Ves. 182; *Re Railton*, 1 Jur. 574; *Re Tayler*, 3 Mac. & G. 427; but see *Ex parte Hall*, Jac. 161; *Horne* v. *Pountain*, 23 Q. B. D. 264.

(*n*) *Re Corbett*, L. R., 1 Ch. 516.

(*o*) *Re Vavasour*, 3 Mac. & G. 275.

(*p*) *Ex parte Phillips*, 19 Ves. 124.

(*q*) 33 Ch. D. 37.

the interest of remaindermen should not be barred further than is necessary; the mortgage should be for a term of years and without power of sale, and should express that the estate tail of the lunatic and the remainders over are barred "for the purpose of giving effect to this security, but not further or otherwise" (*r*). Entail how barred.

When a charge or mortgage is made for the expenses of future maintenance, the judge may direct the same to be payable, either contingently, if the interest charged be contingent, or future, or on the happening of the event, if the interest is depending on an event which must happen, and either in a gross sum, or in annual or other periodical sums, and at such times, and in such manner, as he thinks expedient (*s*). Mortgage of reversionary interest.

The unapplied balance of moneys raised by the sale, mortgage, charge, or other disposition, under the sections of the L. Act, 1890, above referred to, retain the quality and specific destination of the property in respect of which they arose; and the judge will make and give proper orders and directions for carrying this provision into effect (*t*). It will be observed that the corresponding section of the L. R. Act, 1853, applied to "land" only. This was due, Giffard, V.-C., once said, to inadvertence (*u*), but Chitty, J., in a late case, said that it was made to apply to land only advisedly in order to remedy defects in the lunacy jurisdiction (*x*). Destination of unapplied balance of money raised.

12. Sale of Building Land.

By s. 120 of the L. Act, 1890, the judge may direct the committee of the estate to sell any property belonging to a lunatic. The power, under the L. R. Act, 1853, did not extend where the lunatic is entitled to an estate less

(*r*) *Re Pares*, L. R., 2 Ch. D. 61; cf. 3 & 4 Will. 4, c. 74, s. 21; and *Re Penny*, *cit. ap.* Shelf. Lun. 469; *Re Stamper*, 46 L. T. N. S. 372.

(*s*) 53 Vict. c. 5, s. 117, sub-s. (2).

(*t*) Ib. ss. 123, sub-s. (1), 124.

(*u*) *Jones* v. *Green*, L. R., 5 Eq. 555; 16 & 17 Vict. c. 70, s. 119.

(*x*) *In re Freer*, 22 Ch. D. at p. 627.

than the fee (*y*). And the court refused to sanction under that act a contract by the committee for the sale of a house of which the lunatic was seised in fee and which had been burnt down (*z*).

13. Sale, Partition, Exchange.

Provisions of L. Act, 1890.

By s. 120 of the L. Act, 1890, the committee of the estate, in the name and on the behalf of the lunatic, under an order of the judge in lunacy, may concur in making any exchange or partition of any property belonging to the lunatic or in which he is interested, and give or receive any money for equality of partition or exchange. But the committee cannot, under this section, sell the lunatic's undivided share to the owners of the other shares (*a*), though the court will give leave to the committee to take proceedings under the Settled Land Act, 1882, for the sale of a lunatic tenant in tail's undivided share to the owner of the other shares (*b*). All property taken in exchange is to be to the same uses and subject to the same trusts, charges, incumbrances, dispositions, devises, and conditions as the property given in exchange was or would be but for the exchange (*c*). The court has power under the above provisions to authorize an exchange of the land of the lunatic without the minerals (*d*). The court also has power to bar an estate tail to carry out a sale, but only if the court can secure the proceeds of sale going in the same way as the estate would have done (*e*).

Practice where order for partition

A common case of partition or sale is, where an order for one of these purposes has been made by the High

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(*y*) *Re Corbett*, L. R., 1 Ch. 516; and cf. *Re Newton*, *Re Molyneux*, Reg. Lib. 1865.

(*z*) *Re Tomkins*, 60 L.T. N.S. 402.

(*a*) *In re Weld*, 28 Ch. D. 514; and *In re A. M. Woolhouse* reported in note.

(*b*) *In re Gaitskell*, 40 Ch. D. 416.

(*c*) 53 Vict. c. 5, s. 121. The court seems to have jurisdiction to confirm acts done without its authority, and even before the lunatic had been so found. *Re Mary Smith*, L. R., 10 Ch. 79.

(*d*) *In re Dicconson*, 15 Ch. D. 316.

(*e*) *In re Pares*, 12 Ch. D. 333.

Court, and the lunatic has been declared a trustee of the lands or any part thereof, within the meaning of the Trustee Act, 1850 (*f*). The order, authorizing the committee to convey, may, in such cases, be made under both acts (*g*). It is, however, within the jurisdiction of the judge in lunacy to make the vesting order immediately (*h*). In any case the conveyance to the lunatic should be executed and produced to the registrar before the vesting order is made (*i*).

or sale made by the High Court.

No direction is given in the act as to the preservation of the respective interests of the real and personal representatives, when a sum of money is paid instead of being received for equality of partition or exchange. In such a case the order would probably be made in the form adopted on a purchase of land, below referred to; or the money would be declared a charge on the property.

Qu. Conversion where money paid for equality of partition or exchange.

An order in the latter form has been made with respect to the costs incurred on the part of the lunatic, where there was either no sum or an insufficient sum of money received for equality of partition to cover them; and it was directed, in the order for partition, that these should be raised by mortgage of the lands (*k*). Such a provision for securing costs must, however, be made as part of the principal transaction, and included in the conveyance or allotment or transfer of the property. In the case last referred to, where, notwithstanding the order, the lands allotted to the lunatic were conveyed simply to her in tail, she having been tenant in tail of the undivided share, without any provision for raising the costs, the court of lunacy held, that they had no jurisdiction to authorize the committee to mortgage the land for the purpose of raising the costs (*l*). It is presumed that they considered that the costs were not incurred under the order of the lord chancellor in lunacy directly enough (*m*).

Costs of partition.

(*f*) 13 & 14 Vict. c. 60.

(*g*) *Re Bloomar*, 2 De G. & J. 88; *Re Sherard*, 1 De G., J. & S. 421.

(*h*) *Re Molyneux*, 10 W. R. 512.

(*i*) Ib.

(*k*) *Re Bloomar, ubi sup.*

(*l*) *Re Bloomar*, 2 De G., F. & J. 154, and see the remedy there adopted.

(*m*) See 53 Vict. c. 5, s. 109.

Where, instead of the land or part of the land, a sum of consols, representing a share of compensation money paid by a railway company, had been allotted to the lunatic, it was ordered that the lunatic's share of the costs of conveyance, &c., should be raised and paid thereout (*n*).

14. Sale of Speculative Property.

The judge may by order authorize and direct the committee of the estate to sell any property belonging to a lunatic and also to surrender any lease (*o*).

15. Of Sales in Obedience to Compulsory Powers contained in Acts of Parliament.

For the consideration of this class the reader is referred to a subsequent chapter of the treatise (*p*).

16. Procedure in case of Mortgage, Sale, Partition, Exchange, &c. (*q*).

The ordinary method of carrying out any of these dealings with the property is, except where different or additional proceedings have been suggested in the foregoing pages, as follows:—

Summons and evidence.

The committee (*r*) takes out a summons before the masters, accompanied by evidence showing the desirability of the application, the contract (if any) which has been made subject to the approval of the court (*s*), and such

(*n*) *Re Sherard*, 1 De G., J. & S. 421.

(*o*) 53 Vict. c. 5, s. 120 (*a*) (*f*).

(*p*) Post, Bk. II. c. 7.

(*q*) For a form of order for mortgage where property in strict settlement, see *Re Frank*, Shelf. Lun. 475; *Re Pares*, 2 Ch. D. 61; for sale, *Re Humpleby*, Shelf. Lun. 473; *Re Wharton*, ib. 474; for exchange, *Re Miller*, ib. 255.

(*r*) See *Re Townshend*, 2 De G., J. & S. 519.

(*s*) When a sale is to be by auction the particulars and conditions are lodged in the masters' office, and a summons taken out to settle them, and for the approval of the day and place of sale. The master, on proper evidence of the value of the estate by some competent auctioneer or surveyor, fixes a reserved bidding or biddings, and, just before the day appointed for sale, hands to the solicitor having charge of it (who attends him for the purpose) a sealed paper containing the particulars of such

evidence from surveyors or others as to value and the like as may tend to support the character of the transaction. On these materials the master, if in favour of the application, certifies to the judge in lunacy for confirmation in the usual way; while, if he refuses to certify, the committee may himself apply to the judge.

Master's certificate.

Confirmation.

The court is unwilling to direct a sale unless very good reason is shown for that being done; but where an action which would lead to a sale (*e. g.*, an administration action) has been commenced properly with the sanction of the masters, the lunatic will be bound by an order for sale in the action (*t*).

On the contract being confirmed in any case the master will settle the conveyance on behalf of the lunatic, which he does by signing his name on each sheet of the deed but the last, and signing his name and stating his approval on the last sheet. The instrument is executed by the committee signing the name of the lunatic, "by X. Y. his committee" (*u*).

Approval of deed by master.

Execution by committee.

The Court of Lunacy will not authorize a committee to enter into a covenant in a mortgage on behalf of a lunatic (*x*).

Independently of the Married Women's Property Act, 1882, when the lunatic is a married woman the statutory powers will not operate to make execution by her committee a sufficient conveyance of her real or reversionary personal property; acknowledgment and separate examination being essential to the conveyance by her, and being acts which from their nature cannot be performed vicariously. The judge in lunacy has, however, power to

Lunatic a feme covert.

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reserved biddings indorsed under his hand, with a direction that the packet is not to be opened by the auctioneer until he has read aloud the particulars and conditions of sale.

(*t*) *Re Stamper*, 46 L. T. N. S. 372.

(*u*) Elmer, pp. 34, 38, 39. As to the effect of the purchaser paying the purchase-money in accordance with the order of the lord chancellor in lunacy, see *Norris* v. *Stuart*, 16 Beav. 359; and see *Lawrie* v. *Lees*, 12 App. Cas. 19.

(*x*) *In re Fox*, 33 Ch. D. 37.

make such an order as will bind a married woman's beneficial interest and that of her heir after her death (*y*).

Committee cannot purchase.

It is perhaps needless to add, that the committee will not be allowed to purchase his lunatic's estate (*z*).

17. PURCHASE.

Not usually permitted.

A committee will not in ordinary cases be authorized by the court to purchase real estate on behalf of the lunatic (*a*).

Grounds for allowing it.

Where, however, the land or houses which it is proposed to buy are contiguous to the estates of the lunatic and are convenient to be held with them, or where the value of those estates will in all probability be materially enhanced by the acquisition of the property, or where again that value might be materially depreciated if the property were not acquired, the court has, on the petition of the committee, and in some cases more directly on the report of the masters under the 70th section of the Lunacy Regulation Act, 1853, directed the purchase to be made. In one case it was ordered that the estate be conveyed to trustees upon such trusts as would be necessary to preserve to the estate the character of personalty, but with all usual and necessary powers of leasing, management and appointment of new trustees to be exercised under the direction of the lord chancellor in lunacy: such would in all probability be the order in a similar case now (*b*).

Effect of purchase by committee without the sanction of the court on the quality of the estate.

It is noteworthy that in an old case where the committee had purchased lands out of the rents and profits of the estate without the sanction of the court, the right of the personal representatives was on the death of the lunatic treated as undestroyed, and the share of those

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(*y*) *Re Stables*, 4 De G., J. & S. 257.

(*z*) *Ex parte Lacey*, 6 Ves. 627: *Lister* v. *Lister*, Ib. 631; *Downes* v. *Grazebrook*, 3 Mer. 208; but see *Re Butcher*, ap. Shelf. Lun. p. 478.

(*a*) *Awdley* v. *Awdley*, 2 Vern. 192; Shelf. Lun., p. 298; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*b*) Conf. Elmer, p. 206, R. I. 1890, 31.

other than the heir ordered to be paid out of the personal estate, the balance to be a charge in their favour on the purchased property (*c*).

The proceedings before the master in relation to the purchase of land are *mutatis mutandis* the same as in the case of a sale of the lunatic's property (*d*).

As to sale of stock to provide purchase money.

Where the purchase-money is to be raised by the sale of stock forming part of the lunatic's property, the stock should not be sold, although the master may have reported in favour of the purchase and that a good title can be made, until the conveyance is settled (*e*).

Of Details of Management of Personal Estate.

18. Receipts.

The committee's receipt is ordinarily a good discharge for all payments made to him on behalf of the lunatic. At the same time, where the sum is large, it is more satisfactory for all parties that on the application, either of the person making the payment or of the committee, the money should be paid into court. The order for payment into court is universally made on the sale of any part of the lunatic's property by the direction of the court (*f*).

19. Carrying on the Lunatic's Business.

The judge may, by order, authorize the committee of the estate to carry on any trade or business of the lunatic (*g*).

Business is a speculative investment of capital, and one that depends very much upon personal considerations for its success. The court, therefore, hesitates to continue it, and will only do so where the expediency is clear, and supported by evidence, not merely of prosperity in the past,

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(*c*) *Awdley* v. *Awdley*, *ubi sup.*, n. (*d*); see also *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*d*) Ante, p. 186.

(*e*) *Re Meux*, W. N. 1866, p. 83.

(*f*) *Ex parte Clayton*, 1 Russ. 476; *Ex parte Cranmer*, 1 Russ. 477, n. (*a*); ante, p. 163.

(*g*) 53 Vict. c. 5, s. 120 (*c*).

but of the prospect of prosperity in the future. The question comes before the master on his first inquiry, and finds a place in his certificate.

The order usually goes beyond the simple fiat to direct, that the committee shall pass such half-yearly or other accounts as the masters may direct; and that if at any time on passing the accounts, the masters shall be of opinion that the business should cease to be carried on, proper steps shall be taken for winding it up (*h*).

20. Sale and Mortgage of Stock (*i*).

Stock, or, in other words, "any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854, may be sold, mortgaged, charged, or otherwise disposed of, for any of the purposes for which land may be mortgaged or sold, under the 117th section of the L. Act, 1890, already considered (*k*).

21. Transfer of Stock (*i*).

Special provision is made for the transfer of stock belonging to the lunatic, which is (a.) standing in the name of the lunatic, or vested in him; or (b.) standing in the name of, or vested in a committee of his estate, who has died intestate, or himself become lunatic, or is out of the jurisdiction of, or not amenable to the process of the High Court, or as to whom it is uncertain whether he is living or dead, or who neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof as the judge directs.

Transfer of stock.

In such a case the judge may order a fit person to trans-

(*h*) Elmer, pp. 65, 66.

(*i*) "Stock" includes stock and shares which can only be transferred by deed. *Re Ives*, 3 De G., J. & S. 453; *In re Mitchell*, 17 Ch. D. 515; *In re Clyde*, W. N. 1889, p. 43.

(*k*) Ante, p. 181.

fer the stock to or into the name of a new committee or into court or otherwise, and also to receive and pay over the dividends thereof, in such manner as the judge directs (*l*).

The person to be named in the order will be some proper officer of the bank or the company or society, in whose books the transfer is made (*m*). Transfers and payments under the act are valid and binding on all persons, and the security of the persons acting ministerially in obedience to them is suitably provided for (*n*).

22. Investment of Money belonging to a Lunatic.

Ordinary rule.

The lunatic's money will generally be invested in the name of the paymaster-general in trust in the particular lunacy, in some of the securities upon which cash under the control of the court is authorized to be invested (*o*). As James, L.J., once said, the court will not speculate with the lunatic's property. It will not, indeed, necessarily change the existing investment because it is one which it would not sanction in the first instance; when, however, the investment ceases independently, as, for example, by the payment of railway bonds, it will not allow a fresh investment on similar security, unless the comfort of the lunatic renders a larger income necessary; but will order an investment in consols. At the same time a change from railway debentures to debenture stock is not within this rule, and to allow such a conversion is a matter of course (*p*).

Real securities.

Investment in real securities is not favoured by the court, the entanglement of real property making it unsuitable for a trust fund of this particular kind. Eldon, C., drew a distinction, however, between a loan to a stranger and one for the benefit and accommodation of the lunatic's own

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(*l*) 53 Vict. c. 5, s. 133.

(*m*) Ib. s. 137.

(*n*) Ib. s. 146.

(*o*) When the property was small, 4*l*. per cent. India stock was allowed. *Re Metcalfe*, cit. ap. Elmer, p. 58, R. S. C. 1883, Ord. XX., R. 17.

(*p*) *Re Phillips*, L.JJ., 1874, June 20.

family (*q*). And we have already seen that for the benefit of the lunatic's own estate, his personalty may be advanced upon the security of his realty (*r*).

Life annuities.

Practice.

The cases in which the investment of the lunatic's capital in the purchase of a life annuity is permitted have been already considered (*s*). The inquiry of the master is, "whether the lunatic is capable of enjoying greater comforts and advantages than he now enjoys; and if so, whether the same can be secured for him by the investment of the whole, or any, and what part of his property in the purchase of an annuity for life, either from government or from any and what office."

Government annuity.

If the purchase of a government annuity, which is that usually approved of, should be directed, a contract is entered into by the committee with the government annuity office on proof of the lunatic's age and the necessary particulars. The contract and order with an office copy affidavit of the amount of cash or stock necessary to be paid or transferred for the purchase of the annuity are lodged with the master, who issues the usual certificate to the paymaster-general, and the papers are afterwards left with the last-named officer. Care should be taken that all information is ready before the contract is entered into (*t*).

23. Powers as to Property in England, Scotland and Ireland.

Power to deal with property in England, Scotland and Ireland.

By the L. Act, 1890, it is provided that the powers of management and administration of the estates of lunatics conferred by the act shall, without an inquisition or other proceedings in Ireland, extend to the personal property in Ireland of a lunatic so found by inquisition in England where the personal property does not exceed two thousand pounds in value or the income thereof does not exceed one hundred pounds a year; and the like powers conferred by

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(*q*) *Ex parte Calthorpe*, 1 Cox, 182; cf. *Ex parte Ellice*, Jac. 234; *Ex parte Johnson*, 1 Moll. 128; *Baud* v. *Fardell*, 7 De G., M. & G. 633; 1 Fisher on Mortgages, 288 n.

(*r*) Ante, pp. 165, 167.

(*s*) Vide ante, p. 154.

(*t*) Elmer, p. 42.

the Lunacy Regulation (Ireland) Act, 1871, shall, without an inquisition or other proceedings in England, extend to the personal property in England of a lunatic so found by inquisition in Ireland where the personal property or the income thereof does not exceed such amount as aforesaid.

Where a person has been found lunatic by inquisition in England or Ireland, and has personal property in Scotland, the committee of the estate of the lunatic shall, without cognition or other proceedings in Scotland, have all the same powers as to such property, or the income thereof, as might be exercised by a tutor at law after cognition or a duly appointed *curator bonis* to a person of unsound mind in Scotland. Scotland.

Where a tutor at law after cognition or a *curator bonis* has been appointed to a lunatic in Scotland, who has personal property in England or Ireland, the tutor at law or *curator bonis* shall, without an inquisition or other proceedings in England or Ireland, have all the same powers as to such property, or the income thereof, as might be exercised by the committee of the estate of a lunatic, so found by inquisition in England or Ireland.

The powers of management and administration conferred by the act in cases where the property of a person of unsound mind does not exceed two thousand pounds in value, or the income thereof does not exceed one hundred pounds per annum, and the powers conferred by section sixty-eight of the Lunacy Regulation (Ireland) Act, 1871 (*u*), shall extend to the property in Ireland or England, as the case may be, of the lunatic where the total value of the property in England and Ireland does not exceed two thousand pounds in value, or the income thereof does not exceed one hundred pounds a year (*x*).

(*u*) 34 & 35 Vict. c. 22, s. 68. (*x*) 53 Vict. c. 5, s. 131.

24. Power of the County Court Judge in Cases of Property of Small Amount.

Property under 200*l.* in value.

By the Lunacy Act, 1890, it is provided that where a reception order (*y*) is made in the case of a lunatic the value of whose real and personal property is under two hundred pounds, and no relative or friend of the lunatic is willing to undertake the management of the property, any judge of county courts having jurisdiction in the place from which the lunatic is sent, may, upon the application of the clerk of the guardians, or a relieving officer, of the union from which the lunatic is sent, authorise the clerk or relieving officer, or such other person as the judge by his order appoints, to take possession of and sell and realise the property of the lunatic, and to exercise all the powers which could be exercised by the legal personal representative of the lunatic if he were dead. The receipt of the person so authorised is a valid discharge.

Orders of county court judge.

The judge by whom the order is made, may also give directions as to the application of the property of the lunatic for his benefit or in reimbursement of money expended by the guardians of the union for his care or relief, or of the costs or expenses incurred in relation to the lunatic by the guardians, or by the person acting under the order; or the judge may, if he thinks fit, order that the whole or any part of the proceeds of the lunatic's property be paid into the county court to the credit of an account intituled in the lunacy, and any sum so paid in may either be invested in the manner provided by the county court rules in force for the time being, or be paid out from time to time to such person as the judge directs, to be applied for the benefit of the lunatic, or towards such reimbursement as aforesaid.

The person acting under the order renders an account of his dealings with the lunatic's property to the judge by whom the order was made (*z*).

(*y*) As to reception orders, see 53 Vict. c. 5, ss. 4, 341.

(*z*) 53 Vict. c. 5, s. 132.

CHAPTER XVII.

OF PASSING THE ACCOUNTS OF COMMITTEES.

Time for passing accounts.

By the Rules in Lunacy of 1890, it is enacted that all committees and receivers shall annually, or at such longer or shorter periods as the masters shall fix, procure their accounts to be delivered into the masters' office, and attend before the masters from time to time and at or within such time as the masters shall fix, and have such accounts taken and passed (*a*).

Allowances to be made.

In taking and passing these accounts the masters ought to make them all just allowances, including an allowance of their reasonable and proper costs, charges and expenses of passing the account, and those of the next of kin and other persons, if any, allowed to attend on the passing of the account at the cost of the estate (*b*).

Practice where estate very small.

In cases where the property of the lunatic is very small, the court under the old rules has dispensed with the annual passing of accounts (*c*); but it seems that the masters are not justified in doing so without the sanction of the court previously obtained (*d*).

So, again, where the income of the lunatic arises from funds in court, and the whole is required for maintenance, an order may be made for the payment of the whole of the annual dividends to the committee of the person from time to time as the same shall become payable for the maintenance of the lunatic until further order, and the committee of the estate, having nothing to do with the property, is not required to account (*e*).

(*a*) Vide ante, pp. 100, 108 *et seq.*, and R. L. 1890, 75.

(*b*) R. L. 1890, 75.

(*c*) *Ex parte Pickard*, 3 V. & B. 127.

(*d*) *Anon.* 1 Russ. & M. 113.

(*e*) *Re Scarpelain*, Shelf. Lun., p. 239.

Attendance on passing the Accounts.

The practice with regard to the attendance of the next of kin at the passing of the accounts has already been considered, with the notice to which they are entitled (*f*).

Persons to attend.

The masters are to determine, subject to the provisions of the rules, which, if any, of the next of kin, and what other persons, if any, are to attend the proceedings (*g*).

As to manner of appearance.

Moreover, the masters may direct that the several parties appearing before them by different solicitors shall appear by the same solicitor, or that several parties appearing before them by the same solicitor shall appear by different solicitors. When parties directed to appear by the same solicitor cannot agree upon the solicitor to represent them, the master may nominate the solicitor, and if any of such parties insists upon appearing by a different solicitor he shall do so at his own cost (*h*).

Lunatic having no next of kin.

When the lunatic has no next of kin, the attorney-general, who will represent the rights of the attorney-general of the Duchy of Lancaster, on behalf of the crown, must have notice of all proceedings in the lunacy following the return of the inquisition (*i*).

Bankrupt committee.

On the passing of the accounts of a bankrupt committee, besides the persons otherwise authorized to attend, the sureties, or surviving surety of the committee, or if there be no surviving surety the trustee in bankruptcy of the committee will be entitled to notice of the proceedings (*k*).

Deceased committee.

On passing the accounts of a deceased committee, the legal personal representatives of the deceased committee and the new committee are required to attend (*l*).

Death of the lunatic.

On the final passing of the accounts after the death of the lunatic, besides the persons otherwise entitled to

(*f*) Antea, p. 90.
(*g*) R. L. 1890, 39.
(*h*) Ib. 42.
(*i*) *Re Early*, 2 Coop. T. L. C. 107. *In re Kershaw*, 21 Ch. D. 613.
(*k*) *Re Lacy*, ap. Shelf. Lun., p. 243.
(*l*) Elmer, p. 70 ; the probate of his will or letters of administration should be produced.

attend, the legal personal representative of the lunatic must be present in person or by his solicitor (*m*).

First account. The first account of a committee or receiver is usually made out down to the end of the first year from the date of the completion of his security.

Practice. The account should be left at the masters' office within the time fixed by the master, and a summons on leaving taken, when a time will be appointed for proceeding on it. If the account be not disposed of on the first attendance, a time will be appointed for further proceeding, and so on until it is completed. The solicitor should, however, be prepared to dispose of each account (and the costs upon it) on a single attendance, if practicable; and to this end have the vouchers complete and arranged and all necessary office copies of orders, reports, certificates, transcripts, and other documents ready for the purpose of being produced as occasion may require.

Care should further be taken to give sufficient notice of each appointment to proceed to the several solicitors entitled to attend to ensure their being prepared, and sufficient time should also be taken for the appointment to enable the business to be fully disposed of (*n*).

Evidence on passing the accounts. On proceeding on the first account in each lunacy it has to be shown from the master's certificate of the property, that all the property included in the certificate, and the income from it, is duly accounted for; and if any part of the property have been paid into court, the transcript of the paymaster-general's account (which it is always desirable to have, and for which no fee is payable) should be produced. If there have been any receipts or payments in respect of the lunatic's estate not included in the certificate of property, explanation, and, if need be, evidence as to such further items will be required (*o*).

On subsequent accounts being presented for passing, the

(*m*) Elmer, p. 70. Probate or letters of administration to be produced.

(*n*) Elmer, p. 70.

(*o*) Ib.

payment into court of the balance on the last account must be shown by the certificate of the paymaster-general, and the amount of the fund in court, both stock and cash, should also be shown in the same manner (*p*).

What costs and expenses to be brought in.

The costs of the account and of paying and investing the balance on the last preceding account, should be brought in and included in every account passed. Costs of management (if any) are made out as a separate particular. They are dealt with by the master himself, or referred by him to the taxing master, as circumstances require (*q*).

What allowed.

For the general question, what costs of management are allowed to committees, the reader is referred to the chapter "On the Management of the Estate" (*r*). It may, however, be stated here, that no outlay of large amount or extraordinary character will be allowed unless the committee has previously obtained the permission of the court to make it (*s*), and that for this purpose the assent of the masters as to the propriety of the expenditure, unless confirmed by order of the judge in lunacy, is not sufficient (*t*); or even if such outlay be allowed, it will only be after a careful inquiry into the benefit and value of the object of the outlay, the costs of which must be borne by the committee (*u*).

Committee liable for acts of omission as well as of commission.

Nor is the committee responsible merely for property wrongfully expended, but also for that which by his carelessness has been lost, or failed to be gained; and he is bound in every case, and even against himself, to follow up every advantage which would have been legally open to the lunatic if of sane mind: and so, where the committee permitted the solicitor employed in the lunacy to become tenant of part of the estate, and allowed the rent to be in arrear for four years, he was held personally liable (*x*).

(*p*) Elmer, p. 70.
(*q*) Ib.
(*r*) Ante, pp. 158 *et seq.*
(*s*) Ante, p. 159.
(*t*) *Re Brown*, 1 Mac. & G. 201.
(*u*) Ib., and ante, p. 160.
(*x*) *Ex parte Swindell*, 2 De G., M. & G. 91.

Must act entirely for the lunatic's advantage.

Again, where a solicitor to the committees of the lunatic, not appointed, but continued in the post, by them, received and misapplied part of the lunatic's estate, and then died insolvent, the court held the committees liable for the agent's default; and though under the circumstances it made a declaration that they were not to be charged with the loss, their costs were refused them (*y*).

In a case where the committee had a private demand against the estate, which was barred by the Statute of Limitations, Lord Eldon compelled him to disallow the item (*z*).

Default in accounts.

If a committee neglects to bring in and pass his accounts, and to pay or invest the balance or the cash in the bank, he may be charged by the master with interest at the rate of 4*l.* per cent. per annum (*a*); particularly where the committee is shown to have employed the lunatic's property in his own business or for his own purposes (*b*). The court, however, in a proper case, has a discretion to excuse the payment of interest (*c*).

How punished.

The default of a committee or receiver may also be punished by his removal from his office (*d*), or by disallowance of any salary due to him (*e*), or of his costs (*f*). In the last resort it appears that compliance may be enforced by the committal of the committee for contempt (*g*).

Procedure subsequent to passing the account.

The committee's account should not be sworn to until it is passed (*h*); after being passed and attested, it is engrossed by the office stationers, and the engrossment,

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(*y*) *Re Moore*, 23 L. J., N. S., Ch. 153.

(*z*) Cit. per Sir A. Hart, C., in *Congreve* v. *Power*, 1 Moll. 121; cf. *Fergus* v. *Gore*, 1 Sch. & Lef. 107; *Re Gibson*, L. R., 7 Ch. 52; *In re Harris*, 49 L. J., N. S Ch. 327.

(*a*) R. L. 1890, 79.

(*b*) *Ex parte Catton*, 1 Ves. jun. 156; *Ex parte Chumley*, ib.; *Ex parte Hall*, Jac. 160; and cf. the case of receivers, *Fletcher* v. *Dodd*, 1 Ves. jun. 85; —— v. *Jolland*, 8 Ves. 72.

(*c*) *Ex parte Catton*, 1 Ves. jun. 156; *Ex parte Chumley*, ib.

(*d*) *Re Lockey*, 1 Phill. 509.

(*e*) R. L. 1890, 79.

(*f*) *Ex parte Clarke*, 1 Ves. jun. 295.

(*g*) *Re Owen*, cit. ap. Shelf. Lun. 240.

(*h*) See the form of account issued by the masters.

when ready, is sworn to and left at the masters' office (*i*). The allowance of the account by the master is signified in writing under his hand, instead of by certificate as was formerly the custom, the certificate being now made only when it may be specially required for payment of money into court, or for some other purpose, as, *e.g.*, on the death of the lunatic (*k*). An office copy of the account, when allowed, is taken by the committee's solicitor. On disposing of this account, the master fixes the time for paying in the balance, and gives a certificate for the purpose, which is filed in the masters' office. An office copy of the certificate is then obtained and left with the paymaster-general on bespeaking the directions to pay in the balance in pursuance of Rule 77 of the Rules in Lunacy, 1890 (*l*).

Payment and investment of balance.

This balance and any cash at the bank, or so much as is directed by the certificate, are from time to time, and within such time, if any, as is fixed by the masters, to be invested in securities authorized for the investment of cash under the control of the court, and the dividends, unless otherwise certified, to be accumulated by similar investment (*m*). Default in payment in or investment is punishable in the same manner as default in passing the accounts (*n*).

Proceedings on the determination of the relation between the committee and the lunatic

On the determination of the relation existing between the committee and the lunatic, whether, on the one hand, by the discharge (*o*) or death (*p*) of the committee, or, on the other hand, by the *supersedeas* of the commission (*q*) or death of the lunatic (*r*), the accounts of the committee are finally taken before his security is discharged, unless the master thinks fit to dispense with them.

The proceedings, save for such particular rules as to

(*i*) Elmer, p. 71.
(*k*) R. L. 1890, 78.
(*l*) Elmer, p. 71.
(*m*) R. L. 1890, 77.
(*n*) Ib. 79; Elmer, p. 69.
(*o*) Ib. 81.
(*p*) Ib. 81.
(*q*) Ib. 81.
(*r*) Ib. 81.

parties as are hereinbefore mentioned, are the same as on an ordinary taking of account. The balance, if any, found due from the committee is to be paid by him or by his legal personal representatives, as the case may be, into the bank, by virtue of the master's certificate, when the lunatic is still living and no *supersedeas* has issued (*s*); to the lunatic himself when a *supersedeas* has issued (*t*), and to the lunatic's legal personal representatives when the lunatic is dead (*u*).

Balances found due from the committee.

Any balance found due to a committee who is being discharged or has died is ordered to be paid to him or to his legal personal representatives, as the case may be, by the new committee of the estate out of the estate of the lunatic (*x*).

Balances found due to the committee.

Any balance found due to a committee when a *supersedeas* has issued is ordered to be paid to him by the lunatic (*y*).

There is no provision in the rules in lunacy for the payment of a balance found due to the committee of a lunatic, where the lunatic has died subject to the commission. Probably, however, where the outlay had been incurred by the committee under an order and there was a fund in court, the order for payment out would be made conditional on the debt to the committee being discharged. The committee must, in any case, be served with the application for payment out (*z*).

Where lunatic has died.

Where there had been no order for maintenance, an application for payment of arrears of maintenance out of a fund in court without a reference was refused, though the administratrix consented, unless the consent of all parties beneficially interested were obtained. The liability of the fund to make good what should prove to have been properly expended does not seem to have been doubted (*a*).

(*s*) R. L. 1890, 81.
(*t*) Ib. 81.
(*u*) Ib. 81.
(*x*) Ib. 81.
(*y*) R. L. 1890, 81.
(*z*) *Re Wylde*, 5 De G., M. & G. 25 ; and vide post, Bk. II. c. 1.
(*a*) *In re Patrick*, 2 Ph. 394.

No lien on the land of the lunatic.

On the land of the lunatic the committee has no special lien after the death of the lunatic (*b*), though apparently he may have during his life, and a solicitor employed by him and unpaid has been allowed to stand in his place (*c*).

See, further, proceedings after the death of the lunatic (*d*).

Practice when it is desired to dispense with passing committee's accounts on the death of the lunatic.

When on the death of the lunatic it is desired that the passing of the accounts shall be dispensed with, an application is made before the master, together with an affidavit of death and identity, and probate or letters of administration. A summons is then taken out to proceed, and if the master is satisfied he directs accordingly, and discharges the committee's security (*e*).

Sureties must be shown to be alive and solvent.

On each occasion of passing his accounts, the committee of the estate is required to satisfy the master that his sureties are living, and that neither of them has been adjudicated bankrupt or compounded with his creditors. If he fail to do this, the masters require him to enter into fresh security within such time as they shall fix (*f*).

Passing accounts, how, for a discharge.

The passing of the committee's accounts acts as a discharge only in respect of property of the lunatic received by him in his capacity of committee. Where, therefore, the committee of a lunatic received rents of his estate, and, on the supposition that the right to those rents was not in the lunatic but in a third person, paid them over to the third person, the committee was not allowed to set up his final accounts passed in the lunacy as an answer to the claim of the lunatic's personal representative to the rents (*g*).

(*b*) *Jones* v. *Noyes*, 28 L. J., N. S., Ch. 47.

(*c*) *Barnesley* v. *Powell*, 1 Ambl. 102.

(*d*) Post, p. 213.

(*e*) Elmer, p. 99.

(*f*) R. L. 1890, 76.

(*g*) *Wright* v. *Chard*, 4 Drew. 673, 702.

CHAPTER XVIII.

OF SUPERSEDEAS.

THE inquisition of lunacy may be superseded either on formal or on material grounds.

Grounds on which a *supersedeas* may issue.

(a.) The *supersedeas* may issue on formal grounds where the party has been irregularly found a lunatic, *e.g*, when there has been misconduct of the officer holding the inquisition, or of the jury, or of the witnesses, or when there is a technical flaw in the finding itself (*a*).

(b.) The more important ground is the material ground, viz., either the recovery of the lunatic, or the existence of circumstances which render some other arrangement than that introduced by the commission beneficial to the lunatic.

Recovery of the lunatic.

A *supersedeas* on the ground of recovery may issue notwithstanding that the lunatic is not restored to so strong a mental condition as before his insanity, if he is really of sound mind and capable of managing himself and his affairs (*b*); but as the burden of proof is now thrown on those who contend for sanity, this practically demands a mental condition somewhat superior to that which would have prevented a finding of lunacy in the first instance (*c*). Where the insanity has expressed itself in the form of delusions, it must be shown as far as possible that they are removed and not merely that the lunatic alleges them to be so (*d*).

Alteration of arrangements.

A *supersedeas* to allow of an alteration in the arrange-

(*a*) *Ex parte Glover*, 1 Mer. 269; *Ex parte Roberts*, 3 Atk. 6; cf. *Re Wooller*, cit. ap. Shelf. Lun., p. 129; *Re Warren*, ib. p. 125.

(*b*) *Ex parte Holyland*, 11 Ves. 10, 11.

(*c*) *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443.

(*d*) *Re Dyce Sombre*, 1 Mac. & G. 116.

ments relating to the lunatic is the creature of statute and conditional (*e*).

Application for *supersedeas*.

The application for the absolute *supersedeas* is made by summons (*f*). The summons should be taken out in the name of the lunatic alleged to have recovered soundness of mind, not in that of his next of kin or other third parties (*g*), although the committee may be joined as a co-applicant (*h*).

Application in name of lunatic.

Third parties may, however, practically make the application by using the lunatic's name, and it does not seem that in the event of the summons being dismissed, the court can make such parties pay the costs, however reckless the application may have been (*i*).

Evidence in support.

The application for an absolute *supersedeas* must be supported by strong evidence of sanity from medical men and others acquainted with the lunatic, and should indicate that the witnesses are aware of the grounds on which the lunacy was previously determined, and affirm the removal of them, as well as address itself to the general health of the lunatic (*k*).

Applicant examined by judge in lunacy.

On the return of the summons so supported, a time will be appointed for the appearance of the applicant before the judge in lunacy to be examined, the essential preliminary to the issue of the *supersedeas* (*l*), except where the applicant is subject to some bodily infirmity, such as prevents his being brought before the judge. Even then he must be in such a situation as to admit of his being

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(*e*) 53 Vict. c. 5, ss. 105, 106, inf. p. 205.

(*f*) R. L. 1890, 15; as to informality in proceeding by the applicant for a *supersedeas*, see *Re Dyce Sombre*, 1 Mac. & G. 116; *In re Talbot*, 20 Ch. D. 269.

(*g*) *Ex parte Stanley*, 2 Ves. 25.

(*h*) *Ex parte Bumpton*, Mos. Ch. Cas. 78.

(*i*) *Re Dyce Sombre*, *ubi sup.*

(*k*) *Att.-Gen.* v. *Parnther*, 3 B. C. C. 441; *Ex parte Holyland*, 11 Ves. 9; *Re Dyce Sombre*, *ubi sup.*; *Ex parte Loveday*, 21 L. J., N. S., Ch. 231; Shelf. Lun., p. 279; Elmer, 81.

(*l*) *Ex parte Southcot*, Ambl. 111, 112; Fitz. N. B. 2, 233; St. Pr. Reg. 36; *Re Dyce Sombre*, 1 Ph. 436; *Re Gordon*, 2 Phill. 242; Elmer, *ubi sup.* *In re Talbot*, 20 Ch. D. 269.

examined if thought necessary (*m*), and that, though he may have been pronounced to be of sound mind by a competent tribunal in a foreign country. Even though resident abroad.

An undertaking on the part of the committee of the person has been given that no restraint should be imposed, unless by the direction of the lord chancellor, upon a lunatic coming from abroad for inspection in order that a *supersedeas* might issue (*n*). Practice in doubtful cases.

When the judge in lunacy cannot satisfy himself by inspection whether or not the applicant has or has not recovered, one of two courses may be adopted: he may either direct an issue to try the fact (*o*), or he may order that the commission be more or less suspended during a fixed period, and that the master at the close of that period report on the state of the applicant's health, and then may require the applicant to present himself a second time for inspection. The latter of these alternatives has indeed, since Lord King's time been almost invariably adopted, even where no reasonable doubt as to the recovery is entertained. (i.) Issue may be directed. (ii.) Commission may be suspended temporarily. The latter course commonly followed in all cases.

The degree of liberty and independence accorded to the applicant varies of course with the degree of improvement manifested at the first inspection; in some cases the income only, in others the whole estate, is handed over to him for administration (*p*).

Next, as to conditional *supersedeas*. Under the L. Act, Conditional *supersedeas*.

(*m*) *Re Dyce Sombre*, 1 Ph. 436.

(*n*) *Re Dyce Sombre*, 1 Ph. 436; cf. *Re Naylor*, 1 N. R. 173.

(*o*) *Ex parte Holyland*, 11 Ves. 10. In this case the commission had been supported by two former verdicts, but there were special circumstances.

(*p*) This second course was adopted by Lord King in the case of *Lord Ferrers* in 1730, Mos. Ch. Cas. 332; by Lord Hardwicke in the cases of *Sir W. Rooke* (or *Brooke*), 1737, and *Okeover*, 1745; by Lords Loughborough and Thurlow in *Errington's case*, 1798; by Lord Eldon in the case of *Stock*, 1813, and *Paine*, 1822; by Lords Lyndhurst and Cottenham, in *Dyce Sombre's case*, 1844 and 1847; and conf. the order made by Lord St. Leonards in *Leaf* v. *Coles*, in 1 D. M. & G. 417; and by Turner and Knight Bruce, L.JJ., in *Re Blackmore*, 1 D., J. & S. 84.

the judge in lunacy in cases where he is of opinion that it is not expedient, or not for the benefit of the lunatic, that the commission should be superseded unconditionally, but that the same should be superseded on terms and conditions, is empowered, with the consent of the lunatic and the other persons, if any, whose consent he may deem necessary, to order the commission to be superseded on such terms and conditions as he thinks proper, and may make such orders as he thinks fit for giving effect to such terms and conditions. The judge in lunacy may also, if satisfied that a lunatic so found is cured or capable of managing himself and not dangerous to himself or others, though incapable of managing his affairs, if he thinks it desirable that the ordinary proceedings for a *supersedeas* should not be insisted on, by order supersede the inquisition, so far as the same finds that the lunatic is incapable of managing himself, and rescind or vary any order for the commitment of the person of the lunatic. The order is to be on such terms and conditions as the judge thinks fit. Notice is to be forthwith given to the committee of the person and the person under whose care the lunatic is (*q*).

Conditional and partial *supersedeas.*

Supersedeas formerly must be not at all or all in all.

The commission formerly could not be superseded as to the person of the lunatic, and at the same time continued in force as against the parties accountable for the lunatic's estate. If, however, he was content to waive the *supersedeas* until a complaint against the committee had been settled, he might be allowed to instruct his solicitor and direct his case without interference (*r*).

For the terms upon which the committee is discharged upon issuing the *supersedeas*, see the chapter on Passing the Accounts of Lunatics (*s*).

Restoration of lunatic to management of his affairs.

It has been said that the restoration of the party to the management of himself and his affairs which follows on the order for *supersedeas* must be effected by a grant under

(*q*) 53 Vict. c. 5, ss. 105, 106.
(*r*) *Re Gordon*, 2 Ph. 242.
(*s*) Ante, p. 200.

the great seal (*t*). The ordinary practice, however, is for the order for the *supersedeas* and the writ of *supersedeas* (which, indeed, contains a clause restoring the lunatic to the regiment of himself and all his) issuing thereupon to be prepared by the masters, and no further order is required (*u*).

(*t*) Shelf. Lun., pp. 282, 283. (*u*) Elmer, p. 81.

CHAPTER XIX.

OF THE DEATH OF THE LUNATIC.

As to the Effect of Death upon Orders, Reports, and Petitions.

Orders which have and which have not been prosecuted after the death of the lunatic.

ORDERS made in lunacy before the lunatic's death do not necessarily abate. Thus an order to inquire who were the next of kin (*a*), and an order for taxation of costs (*b*), have been prosecuted after the lunatic's death; though the court has refused to order the continuance of inquiries relative to the sale or mortgage of his estate for the payment of debts (*c*), to carry into effect a sale not made in strict pursuance of the order obtained in the lifetime (*d*), or to carry out a contract for a lease under a power of lands of which the lunatic was tenant for life, although the contract had already been approved of by an order in lunacy (*e*).

An order made in the lifetime for the sale of the lunatic's estate to pay debts may, however, be carried out with the assistance of the High Court, although the death of the lunatic has forestalled its execution in lunacy (*f*).

Orders made on reports or petitions presented during lifetime.

Again, the court of lunacy has jurisdiction, after the lunatic's death, to make an order on a report or a petition made or preferred in his lifetime (*g*). As to the case of a

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(*a*) *Ex parte Armstrong*, 3 B. C. C. 238; *Re Singleton*, 8 Ir. Ch. Rep. 263; *Re Roberts*, 3 Atk. 308; *Ex parte Grimstone*, Amb. 707.

(*b*) *Re Hart*, 21 L. J., N. S., Ch. 810.

(*c*) *Re Holmes*, *cit. ap.* Shelf. Lun., p. 25.

(*d*) *Re Loft*, 8 Jur. 206.

(*e*) *Re Kingston*, 2 Ir. Eq. Rep. 169.

(*f*) *Re Humpleby*, *cit. ap.* 2 De G., F. & J. 380.

(*g*) *Ex parte M'Dougal*, 12 Ves. 384. *In re Popham*, 29 W. R. 403.

report, it is true that Knight Bruce, L. J., declined to express an opinion until it should become necessary to do so (*h*), but analogy seems to be in favour of jurisdiction.

What reports and petitions after the death of the lunatic are or are not too late.

A report or petition presented after the death of the lunatic, and relating to proposed dealings with his property for the payment of costs, was, under the old practice, too late, and the court had no jurisdiction to grant or confirm it (*i*).

But applications relating to the winding up of the lunacy proceedings (*k*), to inspect documents retained in the masters' office till the proper hand to receive the same has been ascertained (*l*), and generally to obtain relief in respect of the matters arising out of the lunacy, but which can be granted without dealing with the property itself (*m*); and, finally, by modern practice, for the allowance, taxation, and payment of costs incurred in lunacy proceedings (*n*), may properly be presented after the death of the lunatic.

The costs of an application to confirm the master's certificate where the lunatic died before the hearing, were not allowed in the absence of a legal personal representative (*o*).

Applications in lunacy, after the death of the lunatic, ought to be supported by evidence of the fact, proved by affidavit (*p*).

(*h*) *Re Way*, 3 De G., F. & J. 175.

(*i*) Ib.; *Garnet's case*, 12 Ves. 385; *Pochin's case*, ib.; *Beer* v. *Ward*, Jac. 194; *Re Barry*, 1 Moll. 414.

(*k*) See the succeeding paragraphs of this chapter.

(*l*) *Ex parte Clarke*, Jac. 589; *Re Pearson*, C. P. Coop. 314; but see *Re Fitzgerald*, 2 Sch. & Lef. 442.

(*m*) Except, *e.g.*, to order payment out of court to the executor or administrator of the lunatic; vide infra.

(*n*) *Re Briscoe*, 2 Dr. & W. 501; *Ex parte Fermor*, 1 W. R. 43.

(*o*) *In re Popham*, 29 W. R. 403.

(*p*) Elmer, pp. 246 *et seq.*

Of obtaining Possession of the Lunatic's Property.

Real property. Where heir found in the lunacy.

Where on the death of a lunatic there is an heir found in the lunacy surviving him and asserting his title, there is ordinarily no application to the court with reference to possession of the real estate; though, if the committee interferes, the court may, by virtue of its jurisdiction in lunacy, make an order that the heir be let into possession (*q*). This is one object of the inquiry as to the heir (*r*).

Finding not conclusive.

But neither the finding on the inquiry (*s*), nor the delivery of possession (*t*), is conclusive or declares the rights of contesting parties, which are in nowise connected with the fact that the deceased was a lunatic, nor with anything that has been done in the lunacy, nor with the possession or interference of any person authorized at the time by any authority in the lunacy. Where, therefore, the title is contested, the respective claimants must be left to recover the property in the ordinary course of law, and the question will be decided by the competent jurisdiction (*u*).

Position of the court and of the committee in respect of conflicting claims to the real estate.

In such a case the position of the court is one of absolute impartiality, and that of the committee, as an officer of the court, must be the same. He must not avail himself of advantages conferred by his office to benefit himself in another capacity, or those in whose favour he may be personally disposed. If he does there is juris-

(*q*) It is doubtful how far the court will extend this jurisdiction to control interference by the solicitor of the late committee. *Carrow* v. *Ferrier*, 18 L. T., N. S. 806, per Wood, L. J.

(*r*) *Ex parte Clarke*, Jac. 589.

(*s*) Ib., and cf. *Re Butler*, L. R., 1 Ch. 607; *Re Fitzgerald*, 2 Sch. & Lef. 432; *Re Ferrior*, L. R., 3 Ch. 175; *Carrow* v. *Ferrier*, 18 L. T., N. S. 199.

(*t*) *Re Butler*, *ubi sup.*; *Ex parte Broomfield*, 1 Ves. jun. 458; *Ex parte Phillips*, 19 Ves. 122; *Beer* v. *Ward*, Jac. 194; *Re Barry*, 1 Moll. 414.

(*u*) Ib. The fact that the estate has been in lunacy is no ground for appointing a receiver pending litigation between the claimants. *Carrow* v. *Ferrier*, 18 L. T., N. S. 807.

diction in the court, notwithstanding the death of the lunatic, to restrain him from so abusing the trust committed to him (*x*).

At the same time, the jurisdiction of the court extends to the office and to profit made by it, not to the individual, and it will not order the delivery up of an estate which the committee of the person has seized, not by virtue of any confidence reposed in him, but by virtue of a title adverse to the heir's (*y*).

Orders as to deeds where inheritance contested.

Orders as to deeds where inheritance disputed.

The neutrality of the court is illustrated by the orders relative to deeds belonging to property, the inheritance of which is contested, where those deeds have been in the power of the committee. "Let the deeds be deposited in the masters' office, and let every claimant have access to them." The right to the deeds depends upon the right to the estate; that will be tried before the proper tribunal, and when that is determined the right to the deeds will follow. It may be added that the deeds were ordered not to be delivered up until the costs of the committee were paid (*z*). It is necessary that the person applying for inspection, or for inspection and production, should make out a *primâ facie* title to the property, which makes it reasonably probable that the documents may contain something to support the applicant's case (*a*).

Personal property.

The personal estate of the lunatic cannot be disturbed under the lunacy, and, if he has died intestate, administration must be taken out to his estate and effects in the ordinary way (*b*). On the application of the executors or administrators, any fund in court and the personalty of the lunatic, after provision being made for the payment of the

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(*x*) *Re Ferrior*, L. R., 3 Ch. 178, 179; cf. *Ex parte Fitzgerald*, *ubi sup.*; *Re Butler*, *ubi sup.*; *Foot* v. *Leslie*, 16 L. R., Ir. 411.

(*y*) *Re Butler*, L. R., 1 Ch. 607.

(*z*) *Re Ferrior*, *ubi sup.*; cf. *Ex parte Clarke*, Jac. 589; *Re Pearson*, 1 C. P. Coop. 314; *Re Wood*, 33 L. J., N. S., Ch. 334; *In re Smyth*, 15 Ch. D. 286, and 16 Ch. D. 673, ante, p. 128.

(*a*) *In re Smyth*, 15 Ch. D. 286; 16 Ch. D. 673.

(*b*) *Wigg* v. *Tyler*, 2 Dick. 552; *Ex parte Gilbert*, 1 B. & B. 297; *Re Persse*, 3 Moll. 94.

costs of the committee and the next of kin of the lunatic, will be ordered to be paid or delivered over to them (*c*). Where there is a fund in court the summons must still be served on the committee, though he has passed his account and his security has been discharged (*d*).

Administration in the Chancery Division of the High Court and not in lunacy.

Where it becomes necessary for any interested party to take measures for the administration of the lunatic's estate, the proper procedure is not by application in lunacy, but by proceedings in the Chancery Division (*e*).

Where such an action has been instituted, funds standing in the name of the paymaster-general in trust for the lunatic may be transferred to the credit of the cause on the request of the executors or administrators (*f*).

Questions as to administration, &c., after lunatic's death usually raised in Chancery Division of the High Court.

Similarly any questions relating to the management and administration of the lunatic's estate and income, by a committee, who is not accountable in lunacy, which may be raised by parties interested after the lunatic's death, must be raised in the Chancery Division and not in lunacy. The Court of Chancery could, in the exercise of its ordinary jurisdiction, have entertained a suit against the committee, even during the period of his committeeship; though these accounts generally admit of being taken more conveniently in the lunacy (*g*).

Committee has no special lien,

Note, first, that the committee has no special lien on the estate in respect of moneys advanced for its benefit, and that a purchaser having notice of the claim is no more bound to see to the application of the purchase-money

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(*c*) *Re Perry, Re Hahn, Re Jodrell*, Shelf. Lun., pp. 288 *et seq.*; see also *Re Garden*, 13 L. J., N. S., Ch. 439. It is unnecessary to ask in the summons for directions as to passing the committee's final account, and discharging his security.

(*d*) *Re Wylde*, 5 De G., M. & G. 25.

(*e*) *Grosvenor* v. *Drax*, 2 Knapp, 82; *Sheldon* v. *Fortescue, Aland*, 3 P. Wms. 104, 111, n.; *Wigg* v. *Tyler*, 2 Dick. 553; *Ex parte Gilbert*, 1 B. & B. 297; *Wright* v. *Chard*, 4 Drew. 673, 702; *Scammell* v. *Light*, 32 L. J., N. S., Ch. 53; *Re French*, L. R., 3 Ch. 317; *In re Currie*, 10 Ch. D. 93.

(*f*) *Re Machen, cit. ap.* Shelf. Lun., p. 290.

(*g*) *Scammell* v. *Light, ubi sup.*; cf. *Wright* v. *Chard, ubi sup.*

than if he bought with notice of a simple contract debt (*h*); and, secondly, that a committee who neglects to prosecute his claim for more than six years after the death of the lunatic, is within the Statute of Limitations, and that the certificate of the master's approving of his claim will not take him out of the statute as against an heir who has been no party to the proceedings before the master (*i*).

and is within the Statute of Limitations.

Of further Proceedings in the Masters' Office, after the Death of the Lunatic.

Under the R. L. 1890, the masters, on being satisfied of a lunatic's death, may, without order, open and read any paper writing deposited with them, purporting or alleged to contain any testamentary dispositions made by him for the purpose of ascertaining who is therein nominated executor thereof, and whether any direction is contained therein concerning his funeral or place of interment, and may deliver the same to the proper officer of the Probate Division, to be dealt with according to law. The masters are also to certify who is entitled to receive any funds in court belonging to the lunatic, or any documents or effects relating to his estate deposited in their office, and they are to prepare minutes of an order. The judge will then make the order for payment, transfer, and delivery to the person certified to be entitled (*k*).

Opening of the lunatic's will after his death and deposit in the Probate Division.

This opening of the will, for any of these purposes, could, under the old practice, only be obtained on petition; and so in cases when something beyond the mere ministerial action of the master is required, a special application is still necessary (*l*).

In ordinary practice, an affidavit of the death and identity of the lunatic is laid before the master, and an appointment made before him upon summons served upon

Practice.

(*h*) *Jones* v. *Noyes*, 28 L. J., N. S., Ch. 47.

(*i*) *Wilkinson* v. *Wilkinson*, 22 L. J., N. S., Ch. 155.

(*k*) R. L. 1890, 46, 47.

(*l*) *Re Townsend*, 21 L. J., N. S., Ch. 747.

the several parties in the matter. At the return of the summons, the master opens the will, if required, in the presence of the parties, and gives a certificate of having done so. A request in writing, for the deposit of the will, is then prepared upon paper stamped with a 1*l.* stamp by the solicitor having the carriage of the proceedings, and, on an application of the parties by summons, the will is handed over to the registrar or other proper officers of the Probate Division, who gives the master a receipt for it. The master then issues a certificate of the deposit of the will (*m*). The certificates of the opening and deposit of the will, whether taken together or separately, are filed with the masters, and office copies are taken (*n*).

For the proceedings proper to the passing of the committee's final account, or to that account being dispensed with, and to the discharge of his security, see the chapter on Passing the Committee's Account (*o*).

Delivery out of deeds.

Where any deeds have been deposited in the master's office (*p*), the master proceeds on being satisfied of the death in the usual way, to ascertain and certify who is entitled to receive them (*q*). For this purpose a summons is taken out before them, with evidence showing the nature of the deeds, the property to which they relate, the interest of the lunatic, and the persons now entitled. On the master being satisfied, he will prepare minutes of an order for delivery out to the person certified to be so entitled (*r*).

Where the person named or referred to in the order does not himself attend to receive the deeds, he must give an authority to some other person, signed by him and attested by two witnesses, one of whom must identify by affidavit the giver of the authority. A receipt is given on the delivery out of the deeds (*s*). For the order in case of contest, see above (*t*).

(*m*) Elmer, pp. 98, 99.
(*n*) Ib.
(*o*) Ante, p. 201.
(*p*) Ante, p. 128.
(*q*) R. L. 1890, 46.
(*r*) R. L. 1890, 46.
(*s*) Elmer, p. 95.
(*t*) Ante, p. 211.

Privilege.

Proceedings in lunacy not privileged.

A lunatic was tenant in tail in possession of an estate of which the committee of his estate was tenant in tail in remainder. After the death of the lunatic, without issue, and without having barred the entail, an action was brought against the committee to enforce an agreement in lunacy in respect to the estate into which it was said the committee had entered in her private capacity as well as in that of committee. V.-C. Malins ordered counsels' briefs upon, and the shorthand writer's notes of, the proceedings in lunacy to be produced (*u*).

(*u*) *Tyas* v. *Brown*, 28 W. R. 575.

CHAPTER XX.

OF THE COSTS OF PROCEEDINGS IN LUNACY.

Difficulties as to costs in past time.

THE nature of the jurisdiction of the lord chancellor in lunacy, so long as it depended mainly on the Statute of Prerogatives, occasioned no little inconvenience in dealing with the costs of lunacy proceedings. The crown obtained control over the alleged lunatic's property only on taking possession after office found (*a*); that control was in suspense pending a traverse (*b*), and ended on the issue of a *supersedeas* (*c*), or on death (*d*). Hence it might frequently happen that costs properly incurred for the benefit of the alleged lunatic might fall on those who had from proper motives solicited the protection of the court in his behalf (*e*); while, on the other hand, it was questionable whether the court had jurisdiction to order payment by persons, who had improperly presented a petition, of the costs incurred by the parties resisting it (*f*).

The wide powers now possessed by the court of lunacy to deal with the costs of those proceedings render further allusion to such inconveniences unnecessary. Some of the cases under the old practice are still available to illustrate the practice under the new.

(*a*) *Ex parte Ferne*, 5 Ves. 833.

(*b*) *Sherwood* v. *Sanderson*, 19 Ves. 280; *Ex parte Ferne*, 5 Ves. 833; cf. *Re Cumming*, 1 De G., M. & G., 561; *Re Crosbie*, 5 Ir. Jur., N. S. 257.

(*c*) *Ex parte Glover*, 1 Mer. 269; *Ex parte Loveday*, 1 De G., M. & G. 275; *Anon.*, 4 De G. & J. 103.

(*d*) *Re Pinks*, 12 L. J., N. S., Ch. 57; *Re Hart*, 21 L. J., N. S., Ch. 810; *Re Way*, 3 De G., F. & J. 175.

(*e*) See the cases cited in the four preceding notes.

(*f*) *Re Windham*, 31 L. J., N. S., Ch. 720.

General power as to costs given by L. Act, 1890.

By the L. Act, 1890, costs of all proceedings for the purpose of ascertaining whether a person is lunatic, and of all proceedings in the matter of a lunatic, shall be in the discretion of the judge in lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the judge thinks fit, or by any other party to the proceedings; and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued, and every such order shall have the effect of an order of the High Court (*g*).

This enactment is permissive not imperative, and, though it may give a concurrent remedy, it does not destroy a right of action which would otherwise have existed (*h*). Consequently, the right of a medical witness engaged on behalf of an alleged lunatic at the inquiry remains unaffected (*i*).

Costs of petitioners, when lunacy found.

When not found, or being found, successfully traversed, where petition *bonâ fide*.

Ordinarily, if lunacy is found, their costs, charges and expenses will be allowed the petitioners out of the estate (*k*); and even when the alleged lunatic is on inquisition returned sane, or is subsequently found sane on a traverse, the same rule will usually hold if the petition was *bonâ fide*, and there was reason to believe, at the time of presenting it, that the alleged lunatic would be benefited by a commission issuing (*l*). At all events, in such a case the petitioners will not be required to pay the

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(*g*) 53 Vict. c. 5, s. 109.

(*h*) *Brockwell* v. *Bullock*, 22 Q. B. D. 567; *In re Rhodes*, 44 Ch. D. 94.

(*i*) *Brockwell* v. *Bullock*, *ubi sup.*

(*k*) *Ex parte Price*, 2 Ves. sen. 407; *Re Hart*, 21 L. J., N. S., Ch. 810. They have even been treated on the same footing as the costs of opposing the inquisition, as for necessaries supplied. See *Chester* v. *Rolfe*, 4 De G., M. & G. 798; *Stedman* v. *Hart*, Kay, 607.

(*l*) *Re F.*, 2 D. G., J. & S. 89; *Re C.*, L. R., 10 Ch. 75; conf. *Re Clegg*, 1 Ir. Jur. N. S., 87; *In re Popham*, 29 W. R. 403; *In re Meares*, 10 Ch. D. 552; *In re* an alleged lunatic, 5 T. L. R. 227; *S. C.*, 33 S. J. 216.

costs of a party opposing the petition, even though it be the alleged lunatic himself (*m*).

Where petition vexatious or unnecessary.

On the other hand, the petitioners will not be allowed their own costs (*n*), and may even be required to pay those of all parties if their application is vexatious (*o*), or solely for their own benefit (*p*), or accompanied by misconduct on their part (*q*). Where the party is not found lunatic, even though the case to some extent justifies inquiry, the petitioner will get no costs (*r*). Especially when the petitioner presents the petition at the instigation of a solicitor.

Costs of the alleged lunatic.

The alleged lunatic is entitled to be represented in opposing the petition for inquiry and the commission, and also, where he is permitted to traverse, in traversing the inquisition (*s*). The services of a solicitor for these purposes have been accounted a necessary, and even when the means of providing for payment of costs were scantier than they are now, created a valid debt against the lunatic's estate on an implied contract (*t*). In fact, that a solicitor acting for the lunatic in any proceeding in lunacy may be deprived of his costs as between solicitor and client, he must have been guilty of very reckless and improper conduct indeed (*u*).

Where an inquiry is pending, the court has jurisdiction to sanction the payment of a sum of money to the alleged lunatic's solicitor on account of the expenses of the inquiry (*x*).

(*m*) *Re Windham*, 31 L. J., N. S., Ch. 720.

(*n*) *Re S.*, 4 Ch. D. 301.

(*o*) *Re Clare*, 3 Jon. & Lat. 571; *Re Smith*, 1 Russ. 348. Though Knight Bruce and Turner, L.JJ., seem to have thought there was no jurisdiction. *Re Windham, ubi sup.*

(*p*) *Ex parte Tutin*, 3 V. & B. 149.

(*q*) *Anon.*, 2 Atk. 52; *Re Matthews, cit. ap.* Shelf. on Lun., pp. 135, 136; *Re Smith*, 1 Russ. 349, per Eldon, C.

(*r*) *Re S.*, 4 Ch. D. 301.

(*s*) *Re Frank, cit. ap.* Shelf. on Lun., p. 134; *Re Norris, Re Taylor*, ib.; *Wentworth* v. *Tubb*, 7 Jur. 738.

(*t*) *Williams* v. *Wentworth*, 5 Beav. 325.

(*u*) *Field* v. *Tarner*, 3 W. R. 469.

(*x*) *In re Bullock*, 35 W. R. 109.

Costs of other parties opposing the commission.

The costs of other parties opposing the petition or commission have occasionally been allowed, even when the lunatic was separately represented (*y*). But in order to be allowed costs of attending the inquiry, the party must first have obtained the leave of the court (*z*), and that leave may be granted conditionally, on the party undertaking to be answerable for any increase of costs occasioned by his attendance (*a*). Moreover, the costs of all parties on a vexatious opposition to the commission by persons other than the alleged lunatic may be ordered to be paid by those persons (*b*).

Vexatious opposition.

Order may presumably be made notwithstanding traverse or *supersedeas*.

The order for payment of costs under the above-stated section may presumably be made pending a traverse, and notwithstanding a *supersedeas*.

Notwithstanding death of lunatic.

Nor is the jurisdiction limited to the lifetime of the lunatic (*c*). When, however, the lunatic dies before his estate has been sufficiently brought within the control of the court to be directly applicable for the payment of costs, it is usual to adopt the old practice of a declaration by the court that the costs were properly incurred, and ought to be paid out of the estate of the deceased lunatic in a due course of administration (*d*). This declaration may be obtained on summons.

Usual form when lunatic has died.

Effect of order under L. Act, 1890, s. 109.

The order under sect. 109 has the same effect that an order of the High Court has. Some question has arisen as to the form of the order where the payment of costs is ordered otherwise than out of the estate. In *Re F.* (*e*), a petition by a wife which the recovery of the husband prevented from being proceeded with, the costs were

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(*y*) *Re Portsmouth*, *cit. ap.* Shelf. on Lun., p. 134.

(*z*) Ante, pp. 62, 63.

(*a*) *Re Richards*, 1 De G., M. & G. 715.

(*b*) *Re Smith*, 1 Russ. 348.

(*c*) 53 Vict. c. 5, s. 109. *In re Popham*, 29 W. R. 403 (*unheard petition*).

(*d*) Elmer, pp. 106, 107. See the orders in *Re Hart*, *Re Roberts*, *cit. ap.* Elmer, pp. 259, 260; cf. *Williams* v. *Wentworth*, 5 Beav. 325; *Chester* v. *Rolfe*, 4 De G., M. & G. 798; *Stedman* v. *Hart*, Kay, 607; *Re Cumming*, 5 De G., M. & G. 30. *In re Meares*, 10 Ch. D. 552.

(*e*) 2 De G., J. & S. 89.

directed to be paid by the husband, but after discussion no order was drawn up, the husband's solicitor undertaking to pay the petitioner's costs. In *Re C.* (*f*), where the proceedings were instituted by the commissioners in lunacy, and resulted in a finding of sanity, the order directed payment of the costs of the official solicitor by the alleged lunatic out of his estate; but the court declined to give an opinion as to the manner in which the order might be enforced.

Payment, how enforced.

It would seem that this might be either by *subpœna*, followed on default by a commission of sequestration (*g*), or by writ of *fieri facias* or *elegit* (*h*), or by committal under the Debtors Act, 1869 (*i*).

When ordered to be paid out of the estate.

When the costs under the same section are ordered to be paid out of the estate of the lunatic, application should be made in the lunacy for taxation and payment in the way presently mentioned, and the usual powers for raising costs by sale, mortgage, or charge will be available.

The court of lunacy will restrain proceedings against the lunatic in other courts for payment of costs (*j*); and this is a rule that other courts take judicial notice of (*k*).

Costs of subsequent proceedings.

The costs, charges and expenses of parties having liberty to attend the master on appointment of committees, passing accounts, considering proposals, entertaining applications, conducting inquiries, and the like, are allowed out of the estate, unless there is a special direction that the parties are to attend at their own expense (*l*).

Even where a proposal or inquiry is not adopted, costs

(*f*) L. R. 10 Ch. 75.

(*g*) Cons. Ord. XXVIII. r. 2, and Sch. E., No. 4; see also Ord. VII. Jan. 1870, r. 4 (L. R., 5 Ch. xxxiii.), and 2 Dan. Ch. Pr. 1262 *et seq.*

(*h*) Cons. Ord. XXIX. r. 6; 1 & 2 Vict. c. 110, s. 18; Dan. Ch. Pr. 848, 1265.

(*i*) 32 & 33 Vict. c. 62, s. 5; and cf. *Hewitson* v. *Sherwin*, L. R., 10 Eq. 53.

(*j*) *Jones* v. *Bywater*, 2 Tyrw. 402; *Re Weaver*, 2 Myl. & Cr. 441.

(*k*) *Stedman* v. *Hart*, Kay, 607. See *Brockwell* v. *Bullock*, 22 Q. B. D. 567.

(*l*) The principle on which this is permitted have been already explained in the chapter on the Next of Kin, ante, p. 86.

will be allowed if the masters certify that the proposal or inquiry was a proper one to be made (*m*).

On the other hand, the masters may disallow the costs, charges, and expenses of or incidental to any proposal or inquiry before them, and in the absence of a certificate by them, all the costs, charges and expenses of or incidental to proposals or inquiries which they have not adopted or carried into effect will be disallowed (*n*).

If the masters are of opinion that any application ought not to be granted, or that any inquiry was unnecessary, they are to decide whether the application or inquiry was proper, and if they decide in the affirmative, the proper costs of the application or inquiry shall be allowed on taxation by virtue of their note; but if they decide in the negative, the costs are in the discretion of the judge (*o*).

Higher and lower scale.

Solicitors are, in matters in which the income of a person who is alleged or found to be lunatic exceeds 300*l.* per annum, to be allowed the fees according to the higher scale, and in all other cases the fees according to the lower scale appointed by the Rules of the Supreme Court as to costs for the time being in force so far as the same are applicable, unless the judge otherwise orders, as to all or any of the parties (*p*).

Fixed sum for attendance.

The masters are at liberty, by memorandum in writing, to allow to a solicitor for attending on any summons or appointment before them such a sum, not exceeding five guineas, as, having regard to the special nature of the case, they think reasonable, and where they have not made and have not refused to make any allowance as above-mentioned, the taxing officer is to take into consideration the circumstances of each case, and allow to a solicitor for attending any summons or other appointment such a sum, not exceeding three guineas, as he in his discretion thinks reasonable (*q*).

(*m*) R. L. 1890, 114.
(*n*) Ib.
(*o*) R. L. 1890, 43.
(*p*) R. L. 1890, 107.
(*q*) Ib. 108, 109.

In all cases not otherwise specially provided for in the Rules in Lunacy, solicitors are entitled to charge and be allowed the fees they would be entitled to charge, and be allowed for work and labour of a similar character transacted in the Chancery Division of the High Court (*r*). It is specially ordered that no allowance is to be made for refreshments upon inquisitions (*s*).

Costs in lunacy are taxed by such taxing officer as the lord chancellor directs, and, subject to the Rules in Lunacy, all the provisions of the Rules of the Supreme Court for the time being in force relating to taxation of costs apply to the taxation of costs in lunacy (*t*).

Procedure on taxation.

Where it is ordered that any costs, or costs, charges, and expenses, be taxed, the taxing officer, to whom the taxation of costs is for the time being referred, is to tax and certify the costs, or costs, charges, and expenses, and the names of the respective solicitors to whom the same should be paid; and due notice of attending the taxing officer on the taxation is to be given to such parties as the masters have certified are to attend on the proceedings in the matter; and where it is ordered that the costs, charges, and expenses of any committee or next of kin in the matter of any lunacy be taxed, the taxing officer, in taxing such costs, charges, and expenses, is not to allow the costs, charges, or expenses of any application upon which no order has been drawn up, or of any evidence in relation thereto, unless the same is by any order directed to be allowed or ordered to be costs in the matter of the lunacy, and, as before mentioned, are not to allow the costs, charges, or expenses of or incidental to any proposal or inquiry before the masters which they have disallowed or not thought fit to adopt or carry into effect, unless the masters have certified that such proposal or inquiry was proper (*u*).

The costs of special items of management (*x*), as also

(*r*) Ib. 110.
(*s*) Ib. 111.
(*t*) Ib. 112, 113.
(*u*) Ib. 114.
(*x*) Ante, Bk. I. Pt. i. c. 16.

the costs of lunatics in the special relation of trustees and mortgagees receive separate consideration, and need not detain us here (*y*).

Costs may also be directed to be paid out of capital, but the order is not made until maintenance is provided for, and may be ordered to stand over for the convenience of the estate (*z*).

Costs may be raised by sale, &c.

The costs of applying for, obtaining and executing the inquiry, and of opposing the same, of any proceeding under or consequent on the inquisition, or incurred under the order of the court, or of any sale, mortgage, charge or other disposition of the land or stock of the lunatic by the Lunacy Act authorized to be made, may, under the order of the judge, also be raised by sale, mortgage, charge or other disposition of the lunatic's property (*a*), matters the practice as to which has been already considered (*b*).

No order under s. 109 of the L. Act, 1890, can be made after six years from the time when the right to recover the costs accrued (*c*). In other words, the order for raising a payment, as well as for taxation of costs, must be made within the six years.

Limitation, how interpreted.

The six years begin to run from the time when the right to recover against the lunatic's estate accrues (*d*). Knight Bruce, L. J., was of opinion that this must be a time not subsequent to the death of the lunatic (*e*); Turner, L. J., that if the right did not accrue then, it must, at the latest, accrue when the court declares the costs and expenses to have been properly incurred on account of the lunatic's estate.

Scandal.

Besides liability to costs, scandal, introduced into any of the various proceedings in the lunacy, may give the court cause, as it has jurisdiction, to direct that it be expunged (*f*).

(*y*) Post, Bk. II. c. 4.

(*z*) *Re Knight, cit. ap.* Shelf. on Lun., p. 133, and n. (*e*); *Stedman* v. *Hart*, Kay, 607.

(*a*) 53 Vict. c. 70, ss. 109, 117. *In re Brown*, 50 L. T., N. S., 373.

(*b*) Ante, pp. 181 *et seq.*

(*c*) 53 Vict. c. 5, s. 109.

(*d*) *Re Cumming*, 2 De G., F. & J. 376.

(*e*) Conf. *Wilkinson* v. *Wilkinson*, 22 L. J., N. S., Ch. 155.

(*f*) *Ex parte Le Heup*, 18 Ves. 221.

BOOK I.

Of the Care and Custody of the Persons and Estates of the Insane.

PART II.

WHO HAVE NOT BEEN FOUND LUNATIC BY INQUISITION.

CHAPTER I.

ORDERS FOR THE MAINTENANCE AND MANAGEMENT OF THE ESTATES OF LUNATICS NOT SO FOUND BY INQUISITION BY THE LORD CHANCELLOR IN LUNACY.

Independently of statute law.

"THE lord chancellor," said Lord Brougham (*a*), "as intrusted, by virtue of the king's sign manual, with the care and commitment of the custody of the persons and estates of lunatics, has no jurisdiction to refer it to the master to inquire into the state of mind of lunatics against whom no commission has issued, or to make orders relative to the care of their persons and property and to their maintenance; and although, in certain cases, where the property of persons of unsound mind is too small to bear the expenses of a commission, it is very desirable that the lord chancellor sitting in lunacy should possess such jurisdiction, it can only be conferred by the legislature" (*b*).

These words were spoken in 1831, but it was not until 1845 that the legislature made any provision in this par-

(*a*) *Re Wilton*, 2 C. P. Cooper, T. L. C. 208.

(*b*) See also *Re Astley*, 2 C. P. Cooper, T. L. C. 207; *Ex parte Ridgway*, 5 Russ. 152; *Exeter* v. *Ward*, 2 Myl. & K. 54; *Gillbee* v. *Gillbee*, 1 Ph. 121; and cf. *Sherwood* v. *Sanderson*, 19 Ves. 280.

ticular. By the 8 & 9 Vict. c. 100, it was directed that, whenever the commissioners of lunacy should have reason to suppose that the property of any person detained or taken charge of as a lunatic was not duly protected, or that the income thereof was not duly applied for his maintenance, they should make such inquiries relative thereto as they should think proper, and report thereon to the lord chancellor. The same act gave to the lord chancellor, in respect of all persons received and taken charge of as lunatics upon order and certificate, in pursuance of the provisions of the act or of any act thereinbefore repealed, and who should either have been detained as lunatics for the twelve months then last past, or should have been the subject of a report by the commissioners, in pursuance of the proviso just mentioned, powers analogous to those exercised by him in respect of lunatics so found by inquisition (*c*).

8 & 9 Vict. c. 100.

Report of commissioners in lunacy.

In view, however, of the larger and more effectual powers for the due protection, care and management of the persons and estates of persons of unsound mind, conferred by proceedings under commission, and of the diminished expense of these proceedings under the L. R. Act, 1853 (*d*), the clauses of 8 & 9 Vict. c. 100, which related to this subject, were repealed (*e*); and it is enacted that where the commissioners in lunacy shall report that the property of any person alleged to be a lunatic or detained or taken charge of as a lunatic, but not so found by inquisition, is not duly protected, or that the income thereof is not duly

Repealed.

L. R. Act, 1853, and the L. Act, 1890.

(*c*) 8 & 9 Vict. c. 100, s. 95. The following sections, 96, 97 and 98, contained provisions subsidiary to the objects of the 95th section. It appears that in practice the application of these sections, which was necessarily confined to small properties, and extended only to the income of the property, was cramped and hampered. Parl. Rep. 1859, iii. [207], p. 102.

(*d*) Vide the recital in 16 & 17 Vict. c. 70, immediately preceding s. 53. As to the diminished expense, being but about one half of the former expense, see the evidence of Mr. Wilde, Parl. Rep. 1859, iii. [207], p. 128.

(*e*) 16 & 17 Vict. c. 70, s. 53.

Report of commissioners to have the effect of a petition for inquiry.

applied for his benefit, or to the same effect, the report shall be filed with the masters, and will be deemed and taken to be tantamount to an ordinary petition for inquiry supported by evidence (*f*). The effect of this provision, which was also contained in the L. R. Act, 1853, is to restore the small properties of lunatics to their original state, save that the expenses of a commission are less formidable.

Small properties.

By section 120 of the L. R. Act, 1853, however, authority was given to the lord chancellor in lunacy, when the net estimated value of the property of the lunatic did not exceed 500*l*., to apply it directly for his maintenance without grant of custody, and to make the other arrangements in respect thereof, which are therein mentioned. The design contemplated by this section received a more complete development in the L. R. Act, 1862, the L. R. Amendment Act, 1882, and the Lunacy Acts Amendment Act, 1889, now consolidated by the Lunacy Act, 1890.

L. Act, 1890.

Limit of jurisdiction.

By the last mentioned act the powers and provisions of the act relating to management and administration apply to every person with regard to whom it is proved to the satisfaction of the judge in lunacy by the certificate of a master, or by the report of the commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2,000*l*. in value, or that the income thereof does not exceed 100*l*. per annum (*g*). The statute is to be construed liberally; and, therefore, these sums are to be understood as net value and net income

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(*f*) 53 Vict. c. 5, s. 100, re-enacting s. 54 of the L. R. Act, 1853. The commissioners do not always avail themselves of this power, but in some cases take an undertaking from the next of kin of the lunatic that he shall be supplied with all the comforts and luxuries he is capable of appreciating. 24 Rep. Comm. in Lun. (1870), p. 56.

(*g*) 53 Vict. c. 5, s. 116 (*e*); as to small properties in Ireland see ib. s. 131, ante, p. 192. And as to the powers of the judge of the county court in cases of properties under 200*l*. in value, see 53 Vict. c. 5, s. 132, ante, p. 194.

respectively, after deducting debts and expenses if any incurred for past maintenance (*h*).

The fulfilment of either condition introduces the jurisdiction (*i*). The powers relating to management and administration are exercisable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic (*k*). The jurisdiction is given for the protection of property in uncontested cases, and will not be exercised where the alleged lunatic appears and denies unsoundness of mind (*l*).

Notice to alleged lunatic.

The application will be made by summons at chambers before the masters (*m*).

Seven clear days' notice of the application must be given to the alleged lunatic by service on him of a copy of the summons, with a notice indorsed thereon signed by the applicant or his solicitor (*n*).

In the case of a firm of solicitors, the signature will be by one of the firm; the signature of a clerk (although himself a solicitor of the high court) on behalf of the solicitor is not sufficient (*o*), and an affidavit of service will be filed with the masters (*p*). The person served may file a notice of objection to the application (*q*). The masters may, if they think fit, in the case of a person whose property does not exceed 2,000*l.* in value, or the income of whose property does not exceed 100*l.* a year, dispense with notice of any application after the first (*r*). The masters may visit the alleged lunatic or require him to be

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(*h*) *Re Adams*, 9 L. T. N. S. 626; *Re Sandford*, 1 Mac. & G. 538; *In re Faircloth*, 13 Ch. D. 307.

(*i*) *Harvey* v. *Trenchard*, 34 Beav. 240.

(*k*) 53 Vict. c. 5, s. 116, sub-s. (4).

(*l*) *In re Lees*, 26 Ch. D. 496.

(*m*) R. L. 1890, 15.

(*n*) R. L. 1890, 48.

(*o*) See form of notice in schedule to R. L. 1890, Form 6.

(*p*) R. L. 1890, 49.

(*q*) R. L. 1890, 50; where a form of notice of objection is given.

(*r*) R. L. 1890, 51.

produced before them (*s*). They may also if they deem it expedient direct notice of the proceedings to be given to any of the next of kin, or any other person, and only such persons as the masters direct to be served with notice shall be entitled to attend on the inquiry (*t*).

Evidence in support.

The summons should be supported by evidence as to the nature of the lunacy, and the kindred, property and business of the alleged lunatic. The affidavit of one medical man is generally sufficient.

The masters, unless the judge dispenses with a certificate, certify the result of the evidence, and prepare minutes of such order (if any) as they think should be made, and lay the summons with the certificate minutes (and the evidence if required by the judge) before the judge out of court (*u*).

Alternative courses adopted by the court to deal with the application.

In dealing with the application the judge has three courses open to him.

I. He may make an order thereon without the attendance of counsel, solicitor, or parties, or after such attendance.

II. He may adjourn the summons into court.

III. He may refer the summons to the masters for inquiry, or for further inquiry upon any matter (*x*).

Inquiries by the masters.

When course III is adopted, the masters inquire and certify as to the state of mind and condition of the alleged lunatic, for which purpose they may visit him or require him to be produced before them, as above pointed out (*y*). If they find him of unsound mind and incapable of managing his affairs, they proceed to inquire into :

(1.) His age, position in life, and residence.

(2.) The nature of his lunacy.

(3.) Who are his next of kin and heir at law.

(4.) Who ought to be appointed to exercise the powers usually exercised by the committee of the estate.

(*s*) R. L. 1890, 52.

(*t*) R. L. 1890, 53 ; *In re A. B. Brice*, W. N. 1888, p. 40.

(*u*) R. L. 1890, 18, 19.

(*x*) R. L. 1890, 19.

(*y*) R. L. 1890, 52.

(5.) Of what his property consists, and the particulars thereof.

(6.) The amount of his income.

(7.) In what manner and at what expense, and by whom, and where he has been maintained; what should be allowed for his part maintenance, what, if anything, is due, and to whom in respect thereof, and to whom and out of what fund the same ought to be paid.

(8.) What should be allowed for future maintenance, when the allowance ought to commence, and out of what fund it should be paid (*z*).

Powers of the court.

The powers of the judge in lunacy in regard to this class of lunatics are:

(1.) In his discretion to exercise the powers and provisions of the L. Act, 1890, relating to management and administration (*a*) for the maintenance or benefit (*b*) of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic (*c*).

(2.) To direct the powers of the act made exercisable by the committee of the estate under order of the judge to be exercised by such person in such manner, and with or without security (*d*), as the judge may direct, and any such order confers upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge. Every person appointed to do any act or exercise any power is subject to the jurisdiction and authority of the judge, as if he were

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(*z*) R. L. 1890, 27.

(*a*) 53 Vict. c. 5, ss. 116—130, post, App.

(*b*) *In re Price*, 34 Ch. D. 603; *In re A. B. Brice*, W. N. 1888, p. 40.

(*c*) 53 Vict. c. 5, s. 116, sub-s. (4).

(*d*) When security is not taken, an undertaking is generally required. The security, where any, is approved and settled by the master, and the order is limited not to take effect until the security is certified to be completed.

the committee of the estate of a lunatic so found by inquisition (*e*).

Subsidiary powers.

For carrying out these provisions the judge has the same power as if the lunatic had been so found by inquisition (*f*); and generally, in the exercise of these powers, and otherwise in dealing with the property of the lunatic, the rules relating to lunatics so found will be followed, so far as the same are applicable (*g*).

Similar powers to those just described as applicable to small properties are conferred by s. 116 of the L. Act, 1890, to the following cases, as well as to lunatics so found :—

(1.) To lunatics not so found by inquisition, for the protection and administration of whose property any order has been made before the commencement of the L. Act. (*h*).

(2.) To every person lawfully detained (*i*) as a lunatic, though not so found by inquisition.

(3.) To every person not so detained, and not found a lunatic by inquisition, with regard to whom it is proved, to the satisfaction of the judge in lunacy, that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs (*k*).

(4.) To every person with regard to whom the judge is satisfied, by affidavit or otherwise, that such person is or has been a criminal lunatic, and continues to be insane and in confinement.

Qu. Any limit of property.

Lord Romilly, M.R., in one case expressed an opinion that the jurisdiction under the L. R. Act of 1862 was limited to properties of an income under 50*l.* per annum, or a capital under 1,000*l.* (*l*).

(*e*) 53 Vict. c. 5, s. 116, sub-ss. (2), (3).

(*f*) 53 Vict. c. 5, s. 116.

(*g*) R. L. 1890, 54.

(*h*) *i.e.* 1st of May, 1890, 53 Vict. c. 5, s. 3.

(*i*) 53 Vict. c. 5, s. 4, sub-s. (1).

(*k*) See for cases of mental infirmity short of lunacy, *In re Dewhurst's Trusts*, 33 Ch. D. 416; *In re Martin's Trusts*, 34 Ch. D. 618; *In re Barber*, 39 Ch. D. 187; *Re Campbell*, W. N. 1888, p. 176.

(*l*) *Harvey* v. *Trenchard*, 34 Beav. 240; when this case was decided the amounts were 1000*l.*

Lunatic out of the jurisdiction.

There is still another case in which special powers have been given to the judge in lunacy to deal with the property of persons not found lunatic by inquisition; namely, where any stock is standing in the name or vested in a person residing out of the jurisdiction of the High Court, the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the arrangement thereof according to the law of the place where he is residing, may order some fit person to make such transfer of the stock, or any part thereof, to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit (*m*).

Inquiries.

In connexion with this power the masters are at liberty, without an order of reference, to inquire whether any person resident out of the jurisdiction has by the law of the place where the lunatic resides been found or declared a lunatic, and whether his personal estate, or any part thereof, has been vested in a *curator* or other person appointed for the management thereof according to such law, and whether or not any personal (*n*) property within the jurisdiction is vested in the lunatic, and what is his interest therein (*o*). These inquiries will apparently be directed when they have not preceded the application to the court, the order, for example, of the foreign court appointing the *curator* not being sufficient to establish the lunacy (*p*).

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and 100*l.* respectively, instead of 2000*l.* and 100*l.*, but the case, it is submitted, is of doubtful authority.

(*m*) 53 Vict. c. 5, s. 134. A similar power was given by 11 Geo. 4, and 1 Will. 4, c. 65, s. 34, and cf. the other repealed statutes, 1 & 2 Geo. 4, c. 15; 6 Geo. 4, c. 74, s. 14; and *Sylva* v. *Da Costa*, 8 Ves. 316; *Grimwood* v. *Bartels*, 46 L. J., N. S., Ch. 788; *Re Baynes*, 44 L. T., N. S., 322; *In re Clyde*, W. N. 1889, p. 43; as to power to deal with property in England, Scotland and Ireland, see 53 Vict. c. 5, s. 131, ante, pp. 192, 193.

(*n*) *Grimwood* v. *Bartels*, 46 L. J., N. S., Ch. 788; as to fund representing real estate.

(*o*) R. L. 1890, 33.

(*p*) *Re Stark*, 2 Mac. & G. 174; *Re Elias*, 3 Mac. & G. 234. These cases were, however, previous to 16 & 17 Vict. c. 70, and depended

In a case before Lord Cottenham, under the corresponding clause in 1 Will. 4, c. 65, where it appeared that that officer had been appointed under the decree of the Scotch court, the lord chancellor directed a reference to inquire (i.) whether the alleged lunatic had been found a lunatic according to the laws of the place where she resided; (ii.) whether the stock formed part of her personal estate; and (iii.) whether the petitioner had been properly appointed *curator*, and was qualified to have the stock transferred to him (*q*).

The court has a discretion to refuse even when it has jurisdiction to make the order.

Neither, again, is it imperative on the court to make the order for payment or transfer even where the circumstances give it jurisdiction; and therefore, where the sum is large or the security insufficient, the dividends only will be paid to the *curator bonis* (*r*). In *Re Elias*, Lord Truro, after hesitation, made an order for transfer to a *curator bonis* appointed according to the law of Holland, and apparently without security, on the assumption that no security was required by the law of Holland. He intimated that he should have had no difficulty in making the order if it had been shown that the lunatic was a Dutch subject (*s*). Here the fund was small. Where it is large the court will probably imitate the caution displayed in the earlier order already referred to (*t*). An order has been made for payment of dividends to the attorney in England of a *curator* appointed abroad (*u*). Moreover, as under 1 Will. 4, c. 68, it was also held that the lord chancellor

Attitude of the court towards foreign jurisdiction.

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on the corresponding section (s. 34) of 1 Will. 4, c. 65. Cf. under the yet earlier acts, *Re Irvine* and *Re Pedra*, *cit. ap.* Shelf. on Lun., pp. 267 *et seq.*

(*q*) *Re Stark*, *ubi sup.* See the case of *Hessing* v. *Sutherland*, 25 L. J., N. S., Ch. 687, where the fund was not in court; and *Re Sargazurieta*, 1 W. R. 171, where the fund was subject to 56 Geo. 3, c. 60, s. 5; and cf. the cases in the High Court referred to below, p. 237, n. (*h*), see 53 Vict. c. 5, s. 131.

(*r*) *Re Morgan*, 1 H. & T. 212; and cf. cas. cit, p. 237, n. (*h*); *Grimwood* v. *Bartels*, 46 L. J. Ch. 788.

(*s*) *Re Elias*, 3 Mac. & G. 234; *In re Mitchell*, 17 Ch. D. 515; *In re Barlow's will*, 36 Ch. D. 287.

(*t*) Ante, n. (*r*).

(*u*) *Re Baynes*, 44 L. T., N. S., 322; as to Scotland and Ireland see now 53 Vict. c. 5, s. 131.

has no jurisdiction to deal with the property of a person declared lunatic by a foreign jurisdiction, except only in conformity with the laws of the country where the lunacy has been declared (*x*), it appears that the court will recognize the law of the foreign country to control, though not often to extend, the exercise of its own jurisdiction. And in any case proper evidence of insanity will be required (*y*).

(*x*) *Newton* v. *Manning*, 1 Mac. & G. 362.

(*y*) *In re Tarratt*, 32 W. R. 909.

CHAPTER II.

OF ORDERS FOR THE MAINTENANCE OF LUNATICS NOT SO FOUND BY INQUISITION MADE BY THE HIGH COURT OF JUSTICE.

As to the jurisdiction of the Chancery Division of the High Court in respect of lunatics not so found.

THE Chancery Division of the High Court of Justice has jurisdiction to give directions for the maintenance of a person of unsound mind not so found as part of its general jurisdiction over the administration of trusts (*a*). In one case of *Vane* v. *Vane* (*b*) it is true that Jessel, M.R., appointed a person "to act in the nature of a guardian," but that case is not to be regarded as an authority for the general proposition that the High Court has jurisdiction to appoint a guardian of a person of unsound mind not so found (*c*). The jurisdiction is exercised in accordance with a rule that in some way, whether in a suit or under the Trustee Relief Act or otherwise, the property of a lunatic to be dealt with by the court must be under the direct control of the court; and it accounts for the actual orders in accordance with the principles (a.) that where the court has parties before it, it will not let them go without substantial justice being done (*d*); and (b.) that lunacy does not oust the ordinary jurisdiction of the court (*e*). In *Beall* v. *Smith* (*f*), James, L.J., recognized these principles, and the rule as to lunacy depending upon them,

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(*a*) *In re Bligh*, 12 Ch. D. 364; *In re Brandon's Trusts*, 13 Ch. D. 773.

(*b*) L. R., 2 Ch. D. 124.

(*c*) See *In re Brandon's Trusts*, *supra*, where Jessel, M.R., said that he had not appointed a guardian in *Vane* v. *Vane*.

(*d*) *Richardson* v. *Hastings*, 7 Beav. 326; cf. *Sherwood* v. *Sanderson*, 19 Ves. 280.

(*e*) *Beall* v. *Smith*, L. R., 9 Ch. 85; *In re Edwards*, 10 Ch. D. 605; *Vane* v. *Vane*, 2 Ch. D. 124.

(*f*) *Ubi sup.*

while he explicitly denied the jurisdiction of the court. "Unsoundness of mind," said his lordship, "gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect (*g*). The Court of Chancery is by law the guardian of infants, whom it makes its wards; the Court of Chancery is not the *curator* either of the person or estate of a person *non compos mentis*, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings" (*h*). This is a *dictum* only, but it is in accordance with the principle acted on in *Re Bligh* (*h*). The jurisdiction of the Chancery Division is limited to authorizing the capital or income of a person of unsound mind to be applied for his maintenance so long as he lives under the care of a particular person who has charge of him, and in this sense only can the Chancery Division appoint a guardian of a person of unsound mind (*i*).

Development of the practice of the court.

The practice of giving directions as to the application of the lunatic's property under the control of the court for his past and future maintenance, and otherwise for his benefit, can be traced as far back as the time of Sir Thomas Clark, in 1760 (*k*), and was confined, at least until Lord Brougham's time, to the case of persons who were parties or quasi parties to a suit, the fund itself being in court in the suit (*l*).

The fund must be in court, in a suit,

The jurisdiction in fact is only evoked by the High Court having property belonging to the person of unsound mind in some way under its control (*m*).

(*g*) See 53 Vict. c. 5, s. 143.

(*h*) L. R., 9 Ch., pp. 92 *et seq.*; *In re Bligh*, 12 Ch. D. 364; *Wilder* v. *Pigott*, 22 Ch. D. 263.

(*i*) *In re Bligh, ubi sup.*; *In re Silva's Trusts*, 36 W. R. 366; *In re Tuer's Will Trusts*, 32 Ch. D. 39.

(*k*) *Wilkinson* v. *Letch*, 2 Coop. T. L. C. 195; and cf. *Price* v. *Bedford*, ib. 201; *Eldridge* v. *Croucher*, ib. 196; *Machin* v. *Salkeld*, ib. 198, 201; *Bird* v. *Lefevre*, 4 B. C. C. 100; *Eyre* v. *Wake*, 4 Ves. 795; all before A.D. 1800, and see the cases cited in following notes.

(*l*) *Re Astley*, 2 Coop. T. L. C. 207; and cf. *Re Tayler*, 2 De G., F. & J. 125.

(*m*) *In re Brandon's Trusts*, 13

under Trustee Relief Act,

On the passing of the Trustee Relief Act (*n*), the question arose whether a fund brought into court under its provisions might be dealt with in a similar manner (*o*), and was generally decided in the affirmative (*p*). The principle has been further extended to embrace property standing in the names of trustees, who apply for the direction of the court under Lord St. Leonards' Act (*q*). Finally, it would seem to hold where the fund has not actually been brought into court in an action, but is directed to be brought in by the order for an inquiry as to maintenance and guardianship (*r*).

or in the names of trustees applying under Lord St. Leonard's Act, or directed to be brought into court.

The fund must be small.

A second condition of the exercise of the jurisdiction is that the property must be small (*s*). It is true that in some few cases, about thirty years ago, very considerable sums were dealt with in this manner (*t*), but the condition has been since recognized once more (*u*), and in fact is so in the case of *Vane* v. *Vane*, in which the master of the rolls seems to have stated the jurisdiction in its fullest extent (*u*). The legislature has, in the L. Act, 1890, indicated what amount of property ought to be deemed small, but the jurisdiction is not necessarily limited by the capital of 2000*l.* or the income of 100*l.* there specified (*v*).

Character of the orders made.

The orders that have been made range from simple directions for the payment of dividends to some person on behalf of the lunatic, to directions for the appointment of a guardian of the person and estate, a scheme for past and

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Ch. D. 773 ; *Vane* v. *Vane*, *ubi sup.* ; *In re Tuer's Will Trusts*, *ubi sup.* ; *In re Grimmett's Trusts*, 56 L. J., Ch. 419 ; *Bligh* v. *O'Connell*, 26 W. R. 311 ; *In re Bruin's Trusts*, W. N. 1888, p. 103.

(*n*) 10 & 11 Vict. c. 96.

(*o*) See *Re Berry*, 13 Beav. 455 ; *Re Irby*, 17 Beav. 334 ; *Re Law*, 7 Jur., N. S. 410 ; *Re Macfarlane*, 2 J. & H. 673.

(*p*) See *Re Burke*, 2 De G., F. & J. 124 ; *Re Tayler*, 2 De G., F. J. 125.

(*q*) 22 & 23 Vict. c. 35, s. 30 ; see *Re Spiller*, 2 L. T., N. S. 71 ; *In re T——*, 15 Ch. D. 78.

(*r*) *Vane* v. *Vane*, 2 Ch. D. 124.

(*s*) *Gillbee* v. *Gillbee*, 1 Phill. 121.

(*t*) E.g., in *Re Burke*, 2 De G., F. & J. 124 ; *et ubi inf.* p. 237, n. (*b*).

(*u*) *Beall* v. *Smith*, L. R., 9 Ch. 92 *et seq.*

(*v*) 53 Vict. c. 5, s. 116 ; and see *Vane* v. *Vane*, *ubi sup.*

future maintenance, or the sale and application of the capital for the payment of debts or the purchase of an annuity.

Application of dividends for benefit of lunatic.

The commonest form deals with dividends only. Such payments have been directed to a husband on behalf of his wife (*x*), to a wife on behalf of her husband (*y*), to a parent on behalf of a child (*z*), to a child on behalf of a parent (*a*), to a brother and sister on behalf of a brother (*b*), to an uncle on behalf of a niece (*c*), to a niece on behalf of an aunt (*d*), to a next friend (*e*) or a friend (*f*) on behalf of the persons for whom they are respectively interested, to the official intrusted with the care of lunatics in a colony on behalf of one of his charges (*g*), and sometimes to the *curator bonis* appointed by a foreign authority on behalf of his ward (*h*).

Undertaking to duly apply, &c., sometimes required.

In some cases the order will only be made on an undertaking or security being given for the due application of the dividends for the benefit of the lunatic (*i*), which has been varied in one case to an undertaking not to draw the

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(*x*) *Re Spiller*, 2 L. T., N. S. 71 ; cf. *Edwards* v. *Alvey*, 10 Jur. 650.

(*y*) *Bird* v. *Lefevre*, 4 B. C. C. 100 ; *Conduit* v. *Soane*, 5 Myl. & C. 111 (a son being joined with the wife) ; *Steed* v. *Calley*, 2 Myl. & K. 52.

(*z*) *Re Berry*, 13 Beav. 455 ; *Volans* v. *Carr*, 2 De G. & S. 242 ; and cf. *Re Macfarlane*, 2 J. & H. 673 ; *Re Sturges' Trust*, 5 Jur., N. S. 423.

(*a*) *Price* v. *Bedford*, 2 Coop. T. L. C. 201.

(*b*) *Re Burke*, 2 De G., F. & J. 124 ; and cf. *Gillbee* v. *Gillbee*, 1 Ph. 121 ; *Re Lynn*, 2 Jur. 200.

(*c*) *Eyre* v. *Wake*, 4 Ves. 795.

(*d*) *Eldridge* v. *Croucher*, 2 Coop. T. L. C. 196.

(*e*) *Re Coleman's Trusts*, 14 L. T., N. S. 587 ; *Re Perry's Trusts*, 23 W. R. 335 ; cf. *Machin* v. *Salkeld*, 2 Dick. 634 ; *Price* v. *Bedford*, 2 Coop. T. L. C. 201.

(*f*) *Wilkinson* v. *Letch*, 2 Coop. T. L. C. 195 ; *Light* v. *Light*, 25 Beav. 252 ; *Re Ward*, 29 L. J., N. S., Ch. 784.

(*g*) *Re Baker's Trusts*, L. R., 13 Eq. 168 ; cf. *Re Smeaton's Will*, cit. ib. ; *In re Barlow's Will*, 36 Ch. D. 287.

(*h*) *Re Garnier*, L. R., 13 Eq. 532 ; *Re Albo's Trusts*, 7 L. T., N. S. 778 ; *Volans* v. *Carr*, 2 De G. & S. 242 ; *Grimwood* v. *Bartels*, 26 W. R. 843 ; *In re Barlow's Will*, 36 Ch. D. 287.

(*i*) E.g. *Re Burke*, 2 De G., F. & J. 124 ; *et ubi sup.* n. (*z*) ; *Re Coleman's Trusts*, 14 L. T., N. S. 587 ; W. N. 1866, p. 209.

dividends after the death of the lunatic (*k*), and in another to a direction for an annual application in chambers, showing the then state of mind and amount of property of the lunatic (*l*). Careful as the court is not to make any payment in respect of the wife's separate income to her husband, or otherwise on her behalf, if the husband is able adequately to maintain her, where this is not the case and an order is made for payment to him, he will not be required to give security for the application of the income he receives (*m*).

No undertaking required where wife's separate income paid to the husband.

Provision for past maintenance.

Where, in addition to providing for future maintenance, the payment of a debt for past maintenance has to be considered, the court prefers to apply a fixed part of the income periodically rather than to break into the *corpus*, and particularly so where the creditor is the person to whom the further payments for maintenance are directed to be made (*n*). Where, however, the fund is to be sold for other purposes, the past maintenance may be paid for out of capital (*o*); and even where this is not the case, yet if the future comfort and maintenance of the lunatic seem to be sufficiently secured, either by the income of property, the natural devotion of friends or relations, or otherwise, then even if the amount already expended on maintenance equals or exceeds the fund at disposal, the court will direct an absolute sale, and the application of the produce to the discharge of the debt (*p*). In these cases an undertaking is almost invariably required for the due maintenance of the lunatic in the future (*q*).

(*k*) *Edwards* v. *Alvey*, 10 Jur. 650.

(*l*) *Re Sturges' Trusts*, 5 Jur. N. S. 423.

(*m*) *Brodie* v. *Barry*, 2 V. & B. 36; *Nettleshipp* v. *Nettleshipp*, 10 Sim. 236; vide post, Bk. II. c. 2, s. 2.

(*n*) *Edwards* v. *Abrey*, 2 Coop. T. L. C. 185; cf. *Wilkinson* v. *Letch*, ib. 195.

(*o*) *Re Ward*, 29 L. J., N. S., Ch. 784; *In re Rhodes*, 44 Ch. D. 94.

(*p*) *Re Law*, 30 L. J., N. S., Ch. 512; *Re Macfarlane*, 2 J. & H. 673; *Williams* v. *Allen*, 33 Beav. 241; *Re Gibson*, L. R., 7 Ch. 52; *In re Harris*, 49 L. J., N. S. Ch. 327.

(*q*) Ib.

When the lunatic a pauper.

Similarly, when the lunatic has been maintained in a pauper asylum, property of the lunatic which is in court, either in an action or otherwise, may be made available for his past or future maintenance. In *Re Upfull's Trusts* the order was made under the provisions of 7 & 8 Vict. c. 101, s. 27, which were very similar to those contained in 16 & 17 Vict. c. 97, s. 94, and which are in operation now. The fund had been paid into court under the Trustee Relief Act. Lord Truro, C., was of opinion that as the trustees, if the money had remained in their hands, might, under 7 & 8 Vict. c. 101, s. 27, have paid the guardians, whose receipt would have been a good discharge, and the court was in the position of the trustees, the order for payment to the guardians might be made (*r*). There is now power to deal with property under £200 given to the county courts (*s*).

Whatever doubt may have existed as to the jurisdiction of the court—and that there was doubt is probable from the pains taken to justify the order—is now removed (*t*). The court has, however, a discretion to refuse the relief.

But the court has a discretion to refuse the order.

In *Re Coleman's Trusts* (*u*), Stuart, V.-C., declined to allow any part of the fund to be paid to the workhouse authorities.

In *In re Harris* (*x*) the court held that a claim for part maintenance was simply a debt of the lunatic, and the court would not pay out of his estate in court more than six years' arrears of such maintenance.

(*r*) *Re Upfull's Trusts*, 3 Mac. & G. 281; cf. *Re Ward*, 2 W. R. 406; *In re Marman's Trusts*, 8 Ch. D. 256; *Derby Union* v. *Sherratt*, 27 Ch. D. 710; *In re Newbegin's Estate*, 36 Ch. D. 477; *Guardians of Lambeth* v. *Bradshaw*, 57 L. T., N. S. 86.

(*s*) 53 Vict. c. 5, s. 132.

(*t*) *Re Parker*, 2 W. R. 139; *Re Drewery's Trusts*, ib. 436; *Re Buckley's Trusts*, Johns. 700; *Re Phelps' Trusts*, 28 L. T., N. S. 350; and cf. *Re Baker's Trusts*, L. R., 13 Eq. 168.

(*u*) 14 L. T., N. S. 587.

(*x*) 49 L. J., N. S. Ch. 327; *In re Newbegin's Estate*, 36 Ch. D. 477; *Guardians of Lambeth* v. *Bradshaw*, 57 L. T., N. S. 86.

Patient in a private asylum.

The relief has not to the author's knowledge been extended to the case of a private asylum (*y*), though as the proprietor can obtain a remedy in a more circuitous manner it is difficult to see why it should not be.

When the income insufficient.

Again, where the income arising from the capital sum has been considered insufficient for the proper maintenance of the lunatic, orders have been made for selling the fund or a part of it, and with the proceedings purchasing an annuity in his name and applying the income for his benefit (*z*).

Purchase of annuity.

Where the annuity could not be purchased in the name of the attorney-general, the court has empowered some other person to act in the matter (*a*).

Sale of reversionary interest.

So reversionary interests of parties have been made available for their immediate support. In *Johnson* v. *Turner*, a father was entitled for life, remainder to his children, one of whom was of unsound mind. On a bill filed by the father and his son by his next friend, Malins, V.-C., ordered the reversionary share of the lunatic and his father's life interest in it to be sold, the price of a government annuity to the value of his interest to be paid to the father, and the residue of the proceeds of the sale to be invested in a government annuity in the names of the trustees of the settlement, and applied for the maintenance of the son (*b*).

This order was an extension of the previous practice. Thus, in *Walker* v. *Symons*, on an application for the sale of a reversionary interest, there being no other fund out of which to provide for past and future maintenance, Lord Lyndhurst ordered a sale, and applied part of the proceeds in payment of debts already incurred on behalf of the

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(*y*) See *Peters* v. *Grote*, 7 Sim. 238.

(*z*) *Re Dodsworth's Trusts*, 10 Ha. 16; *Magnus* v. *Bingley*, 2 W. R. 130; *Re Ward*, 29 L. J., N. S., Ch. 784; *Davies* v. *Davies*, 2 De G., M. & G. 51.

(*a*) See *Davies* v. *Davies*, *ubi sup.*

(*b*) *Johnson* v. *Turner*, W. N. 1868, p. 305.

lunatic, but was not disposed to deal prospectively with the residue of the fund without a commission (*c*).

In the case of *Wilder* v. *Pigott* (*d*), Kay, J., said that the High Court has power to elect for a married woman of unsound mind not so found, the Court having jurisdiction to bind the equitable interests of lunatics not so found when it appears for their benefit. Election by married woman.

(*c*) *Walker* v. *Symons*, 8 Jur. 49. (*d*) 22 Ch. D. 263.

BOOK II.

Of Insanity in Relation to Civil Rights and Duties.

CHAPTER I.

INSANITY IN RELATION TO CONTRACTS (*a*).

General theory of the law as to agreements.

THE general theory of the law with regard to acts affecting the rights and interests of the persons who do them is, that there must be a full and free consent on their part in order to bind them (*b*). This consent has been defined as an act of reason accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side (*c*). So M. Barbeyrac, the commentator on Puffendorff, observes, that every true consent implies three things—first, a physical power; secondly, a moral power; and, thirdly, a serious and free use of them (*d*). While Grotius says, that what is not done with a deliberate mind does not come under the class of perfect obligations (*e*).

Contracts of lunatics generally held void.

It is on this general ground that the contracts and voluntary acts of idiots, lunatics, and persons of unsound mind,

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(*a*) Mr. Pollock's sketch of the transitions of the law in regard to contracts of lunatics is very clear and elegant, but some of the conclusions are perhaps a little premature. The chapter, as indeed the whole book, will reward study.

(*b*) Grotius, De J. B. et P. bk. 2, c. 11, s. 5; Puffend. De J. N. et G. bk. 3, c. 6; Fonbl. Eq. bk. 1, c. 2, s. 1; 1 Pothier, pt. i. c. 1, s. 1, Art. 4. (Evans' Edit.); Chitty on Contr.; Addison on Contr.; 1 Story on Contr. 63; Story on Eq. Jurisp.; Pollock on Contr. c. 1; Colquhoun's Civil Law, ss. 1510, 1511.

(*c*) Fonbl. Eq. bk. 1, c. 2, s. 1.

(*d*) Puffend. De J. N. et G. bk. 3, c. 6, s. 3, Barbeyrac's note 1; cf. for the case of drunkenness, Heinecc. El. Jur. Nat. 1, 14, 392, and note ib.; Puff. bk. 1, c. 4, s. 8.

(*e*) "*Quod autem fit animo non deliberato, id nos quoque ad vim obligandi non credimus pertinere.*" Grot. De J. B. et P. bk. 2, c. 11, s. 4.

have by the positive law of various nations been treated as invalid (*f*). Grotius insists, indeed, that it is a part of the law of nature; for to constitute the obligation of a promise, he says, *Primum requiritur usus rationis; ideo et furiosi et amentis nulla est promissio* (*g*). The Institutes declare that *Furiosus nullum negotium gerere potest, quia non intelligit quod agit* (*h*). Nor is the doctrine of our own common law, as stated by the earliest writers, in any respect different. Thus, Bracton says, *Furiosus autem stipulari non potest, nec aliquod negotium gerere, quia non intelligit quod agit* (*i*); and the author of Fleta uses language to the same effect (*k*). In other words, *the civil acts of the insane were simply void* (*l*).

Grotius.

Institutes.

Bracton.

Fleta.

Whether this canon was itself engrafted on English law from the civil code, or merely drew from that source the language in which it was impressed, its simplicity was better suited to English society under Edward the First, than to that of the Roman world under Justinian. In the England of the thirteenth century commerce was in its infancy, personal property a trifling element in the national wealth, real property rarely aliened, and then only with solemn circumstances which insured publicity. The canon, therefore, might be applied without sensible inconvenience. But suppose commerce developed, dealings between man and man multiplied, personalty important and transferable without formality, realty frequently aliened, and that in ways designed to ensure privacy; and

Observations on the plain doctrine, "All civil acts of the insane are void."

(*f*) By the Roman law, Inst. bk. 3, tit. 19, s. 8; Dig. bk. 50, tit. 17, s. 143; Gaius, bk. 3, s. 106; by the French code, s. 1108 *et seq.*; by Scotch law, Ersk. Inst. by Ivory, p. 593; and conf. 1 Stair, Inst. bk. 1, tit. 10, s. 13; 2 Stair, Inst. bk. 4, tit. 20, s. 49.

(*g*) Grotius, De J. B. et P. bk. 2, c. 11, s. 5.

(*h*) Inst. bk. 3. tit. 19, s. 8; Gaius, bk. 3, s. 106.

(*i*) Bract. bk. 3, c. 2, s. 8.

(*k*) Fleta, bk. 2, c. 56, s. 19; Britt. bk. 1, c. 29, s. 6; cf. also Cowell, Inst. Jur. Angl. lib. 2, tit. 7, s. 4; Mirrour of Justices, c. 2, s. 27.

(*l*) In the case of *In re Rhodes*, 44 Ch. D. 94, Cotton, L.J., said, "there cannot be a contract by a lunatic." *Grove* v. *Johnston*, 24 L. R., Ir. 352.

then endeavour to apply the plain canon, that the act of the insane is void. The objections are apparent—the insecurity of enjoyment, the encouragement of fraud, restraint of trade, restraint of alienation (*m*).

Gradual modification of the canon.

However these objections might be disregarded by the sovereign legislature at Rome, they attracted the attention of the judicial legislators of this country as the growth of its civilization gradually forced them into existence; but it was consistent with the conservative spirit to which the stability and the eccentricity of the English common law are alike due, that they should endeavour to obviate the difficulty rather by minute distinctions of cases or formal rules of procedure, than by an overt modification of the canon itself. By small degrees the universal authority of the doctrine has been undermined; many cases which would once have been referred to it directly are decided differently; many are decided in the same way, but on more refined grounds; but the extent to which it is obsolete is uncertain. It is only certain that it is not wholly so, and that the remnant of authority that it retains is distinguished by the same eccentricity which marked its earlier operation.

The doctrine that no man may stultify himself by pleading his own incapacity.

The earliest attack upon the doctrine appears to have been made by the celebrated rule of procedure that no man should be heard to stultify himself by pleading his own insanity (*n*). This doctrine is of ancient date though certainly not coëval with English law. Britton, in the reign of Edw. I., writes that *non compos* was then a sufficient plea

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(*m*) Cf. the observations of Cranworth, C., in *Elliot* v. *Ince*, 7 De G., M. & G. 487.

(*n*) The maxim that a man should not be allowed to plead his own incapacity has been supported on three different grounds:

1. Because he may not stultify himself and disable his own person.

2. Because when he recovers his memory he cannot know what he did when *non compos* (39 H. 6, 42 b; 5 E. 3, 70; 35 Ass. 10).

3. On the ground of public policy to favour alienations (3 Bac. Abr. "Idiots and Lunatics," (F)).

The first ground has the most authority, the last the most reason. See, in addition to the authorities cited in the following notes, Newland on Contr., pp. 15—21; 2 Bl. Comm. 291, 292.

to avoid a man's own bond (*o*), and there is a writ in the register for the alienor himself to recover lands aliened by him during his insanity (*p*). It is not until the time of Edw. III. that the point is raised (*q*). Even later than this, Fitzherbert distinctly states that the writ of "*Dum fuit non compos mentis*" lies for him who has aliened his land in fee simple, fee tail, for life or years, while he was of unsound mind (*r*). On the other hand, in the time of Elizabeth, it was at least twice held that the plea was bad, and the opinion of Fitzherbert not law; once in an action of debt upon a bond (*s*), and once in an action against an innkeeper for the loss of his guest's goods (*t*). Sir E. Coke cites the maxim without qualification, referring to Littleton and the Year Books for authority, and applies it to deeds, feoffments and grants (*u*). It was relied on in *Beverley's case per tot. cur.*, which further resolved that neither should there be relief in equity (*x*),—a veto practically unobserved (*y*).

The doctrine that no man may plead his own incapacity.

The common law judges of the early part of this century, while citing the familiar maxim when a decision in accordance with it appeared equitable, seem to have been indisposed to rely upon it by itself (*z*); and did not hesitate to ignore it where its operation would have been unjust (*a*).

The doctrine how regarded in modern times.

(*o*) Britt. f. 66.

(*p*) Fol. 228; Mem. Scacc. 22 Edw. 1.

(*q*) 5 Edw. 3, 70; 35 Ass. pl. 10; cf. 39 Hen. 6, 42.

(*r*) F. N. B. 202.

(*s*) *Stroud* v. *Marshall*, Cro. Eliz. 398.

(*t*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*u*) Co. Litt. 247 a; 4 Rep. 123 a; Shep. Touchst. 289.

(*x*) 4 Rep. 123 b.

(*y*) *Att.-Gen.* v. *Parkhurst*, 1 Ch. Cas. 112; *Ridler* v. *Ridler*, 1 Eq. Cas. Ab. 279; and cf. Dan. Ch. Pr. p. 81.

(*z*) *Baxter* v. *Portsmouth*, 5 B. & C. 170; *Brown* v. *Jodrell*, 3 C. & P. 30; *Anon.*, per Bailey, J., *cit. per* Brougham, C., ap. *Howard* v. *Digby*, 2 Cl. & F. 662, 663. In 1845, Lord St. Leonards still writes, "It is incontrovertibly established that the party himself cannot, after he has recovered his senses, plead his lunacy in avoidance of the deed." 2 Sugden, Powers, 7th edit. p. 179.

(*a*) *Yates* v. *Bowen*, 2 Str. 1104; *Faulder* v. *Silk*, 3 Campb. 126; *Gore* v. *Gibson*, 13 Mees. & W. 623; see the note to this case, 9 Jur. 142.

The character of the transaction, the presence or absence of notice on the part of the other party, and other distinctions to be considered hereafter, were introduced, until at last it could be said, as it was said by Pollock, C.B., in the case of *Molton* v. *Camroux* (*b*), that the rule as laid down by Littleton and Coke, that no man would be allowed to stultify himself and avoid his acts on the ground of his being *non compos mentis*, has in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract if it could be shown that the defendant was not of capacity to contract and the plaintiff knew it.

Present rule.

In the meanwhile the maxim had been vigorously assailed by many eminent authorities. Fonblanque declared it to be "in defiance of natural justice and the universal practice of all civilized nations in the world" (*c*). Lord Holt said that it was unaccountable that a man should not be able to excuse himself by the visitation of heaven, when he might plead duress from men to avoid his own act (*d*); Sir W. Evans affirms that nothing could be more absurd than this maxim (*e*); and Mr. Justice Story says of it, "how so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilized beings is a matter of wonder and humiliation" (*f*). In America the maxim has been utterly discarded as at variance with reason and justice; and the authorities sustain the doctrine that either lunacy or idiocy nullifies a contract, and that it may be either

Attacks on the maxim.

(*b*) *Molton* v. *Camroux*, 2 Exch. 487, 501; confirmed on appeal, 4 Exch. 17; and post, p. 252, and comp. the rule in cases of intoxication, *Gore* v. *Gibson*, 13 M. & W. 623; per Parke, B., and the cases there referred to; *Yates* v. *Boen*, 2 Str. 1104; B. N. P. 172; *Drew* v. *Nunn*, 4 Q. B. D. 661; *Grove* v. *Johnston*, 24 L. R. Ir. 352.

(*c*) 1 Fonbl. Eq. bk. 1, c. 2, s. 1.

(*d*) *Thompson* v. *Leach*, 3 Mod. 301.

(*e*) 2 Poth. on Oblig., Evans' note, App. 3, p. 25.

(*f*) 1 Story, Eq. Jur. 236.

specially pleaded or shown in evidence under the general issue (*g*).

Reply.

With deference it is submitted that the maxim was not so absurd in practice as it doubtless appears in theory; that it was probably more serviceable to the community from the protection it afforded to *bonâ fide* purchasers and to the general transactions of commerce than prejudicial from any injustice it might do to the individual; and that it was the first step in the formation of the present doctrine of the English courts, which is at once more just and more reasonable than either a blind adherence to the maxim or its unqualified repudiation.

Maxim how far applicable to privies.

The disability to avoid an act by plea of insanity did not, according to Coke, extend to those who claimed under the insane person either by privity in blood or by privity of representation,—in other words, to the heir, executor or administrator; it did extend to his privies in estate and in tenure (*h*). In the old case of *Thompson* v. *Leach*, a *deed* executed by a lunatic was held void against his privy in estate (*i*); and Coke himself says that a feoffment or gift by attorney is void not only against privies in blood, representation and estate, but against privies in tenure also (*k*).

Present rule.

In the present day it may be safely affirmed that no privy of whatever kind stands in a better position than the person whose act he seeks to avoid (*l*). On the other hand, it is clear that privies in estate at any rate are entitled to avoid acts which the lunatic himself might have avoided (*m*); whether the same privilege would extend to

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(*g*) *Mitchell* v. *Kingman*, 5 Pick. 431; *Seaver* v. *Phelps*, 11 Pick. 304; *Fitzgerald* v. *Read*, 9 Sm. & Marsh. 94; *Rice* v. *Peet*, 15 Johns. 503; *Grant* v. *Thompson*, 4 Conn. 203; *Lang* v. *Whiddon*, 2 N. H. 435; *Somes* v. *Skinner*, 16 Mass. 348; 1 Story on Contr. 75.

(*h*) 4 Rep. 123 b; 8 Rep. 22.

(*i*) Carth. 211, 250, 435.

(*k*) 4 Rep. 124; cf. F. N. B. 202 e.

(*l*) *Molton* v. *Camroux*, 2 Exch. 487; on app. 4 Exch. 17; *Price* v. *Berrington*, 3 Mac. & G. 486; and many other cases.

(*m*) *Elliot* v. *Ince*, 7 De G., M. & G. 475.

privies by tenure is a point which the author does not presume to decide.

Avoidance of act by the crown on inquisition found.

One remedy applicable during the lifetime of the insane person Coke does point out. Let him once have been found idiot or *non compos mentis* by office at the king's suit, and every feoffment, gift, lease or release made or executed by him since the time as from which his incapacity was found to have commenced might be avoided; and by a *scire facias* against the alienees the land be seised into the king's hands, and thereby the inheritance be revested in the idiot or *non compos* (*n*). So, after office, all gifts made by him of his goods or chattels, and all bonds, were utterly void; and if he were sued in any action upon any bond or writing he might have made, the king, by his writ (so long as the office stood in force), reciting the office, might send a *supersedeas* to the justices where the suit was commenced (*o*). The acts, however, of a lunatic done by him *inter lucida intervalla* would still bind him (*p*).

Acts done in a lucid interval.

Modern practice.

So much of the foregoing provisions as relates to the acts of an insane person done before office found is of little importance now when the inquiry is seldom if ever carried back to a past time (*q*), and does not distinguish idiocy from other forms of insanity (*r*). Besides, in all cases of lunacy the alienee would be entitled to assert the existence of a lucid interval at the time of the transaction, and rely on the final exception. As to acts done by the insane person after he has been duly found of unsound mind the case is somewhat different, but it may be affirmed that the writ would not now be issued; if a transaction,

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(*n*) Fitz. N. B. 106; *Leach* v. *Thompson*, *ubi sup.* n. (*i*); 4 Rep. 126, 127; 8 Rep. 170 a, 338; Co. Litt. 247 a; 3 Bac. Abr. "Idiots and Lunatics" (C) and (F); and vide ante, Bk. I. pt. i.

(*o*) 4 Rep. 126, 127. It is said that the lord chancellor has himself sometimes directed an issue to try the validity of civil acts of an insane person, Shelf. on Lun., p. 343; and cf. *Re Humpleby* (*cit. ib.*); but in *Re Kirkwall*, (*cit. ib.*) a suit was suggested as the proper course.

(*p*) 4 Rep. 125 a.

(*q*) Ante, p. 51.

(*r*) Ibid.

whether before or after the finding, were one proper to be avoided or repudiated, the committee would be directed to take in the name of the lunatic the proper steps for the purpose, and the decision would be based on the principles ordinarily applicable. Of course the fact of the finding might be of collateral importance in bringing notice of the insanity home to the other party.

Distinctions taken to evade the simple canon.

We now pass to the distinctions which have from time to time been drawn between different classes of transactions for the purpose of determining the responsibility of lunatics in respect of their civil acts, notwithstanding the general canon that the civil acts of the insane are void.

Matters of record not avoidable.

Matter of record.

And 1st, advantage was taken of the division of acts and contracts recognized by the law into matter of record and matter *in pais*. To the former class belong all proceedings that take place under the jurisdiction, or with the cognizance, of a court of due authority acting within its jurisdiction. Such, for example, were fines and recoveries; such are still statutes, recognizances, statutory acknowledgments, and the like. To these proceedings are attached a solemnity and importance which does not belong to matter *in pais*. The dignity of the court is held to be involved in maintaining that which it has itself sanctioned. In extending this principle to the case of insanity there was less a repudiation of the original canon, that the act of the insane is void, than the affirmation of a rule of law having a paramount validity. And so it is written that "all acts which a man *non compos* doth in a court of record shall bind himself and all others for ever;" and that alienation by fine or recovery was binding even when by office found the *non compos* had been brought under the protection of the crown (*s*).

(*s*) 4 Rep. 124; cf. Cro. Eliz. 157; Co. Litt. 247 a; *Hugh Lewing's case*, 10 Rep. 42; *Mansfield's case*, 12 Rep. 123, 124; *Murley* v. *Sherrin*, 8 A. & E. 754; 3 Bac. Abr. tit. "Fines and Recoveries" (C); *Hume* v. *Burton*, 1 Ridg. P. C. 16, 276; *Needler* v. *Winchester*, Hob. 220. A lunatic having once levied the fine could declare the use of it. 10 Rep. 42 b; Hob. 224.

Rule how evaded,

at law;

in equity.

Wherever it was possible to escape from the stringency of this rule, however, even the common law judges were ready to do so; as *e.g.*, by avoiding the deed creating the tenant to the *præcipe*, though they could not avoid the recovery directly (*t*); while the courts of equity availed themselves of their ordinary jurisdiction to compel those who had acquired a valid legal estate to stand seised upon trust for, and reconvey to, the lunatic or his representatives (*u*).

Statutes merchant, &c.

Lord Brougham, indeed, once went so far as to say that a lunatic cannot be a cognisor in a statute merchant or staple, or in a judgment, warrant of attorney, or any other security (*x*); but perhaps his lordship meant no more than is meant when it was enacted that lunatics were incapable of levying fines (*y*), which nevertheless, when levied, were not avoidable. At any rate, the rule seems to have been so laid down (*z*).

At the present day, it is presumed that the liability of a lunatic under an act of record would be determined by similar equitable considerations to those which determine his responsibility for acts *in pais*; to which we now proceed.

2nd. As to the modifications which have been made in regard to matters *in pais* of the plain doctrine that—

Old rules.

1. The acts of a lunatic not proved to have been done in a lucid interval are void (*a*).

(*t*) *Wentworth* v. *Cholmeley*, *cit. ap.* 3 Atk. 313. Again, a recovery suffered by attorney was not conclusive. *Beverley's case*, 4 Rep. 126 b; Cro Eliz. 187; *Hume* v. *Burton*, 1 Ridg. P. C. 16; *Thompson* v. *Leach*, Carth. 435; *Stokes* v. *Oliver*, 5 Mod. 209; *Ex parte Roberts*, 3 Atk. 308; *Walcott* (*Vouchee*), 3 Bingham, 423.

(*u*) *Addison* v. *Dawson*, 2 Vern. 678; cf. 3 Atk. 308, 310; *Welby* v. *Welby*, Toth. 164, 166; *Wright* v. *Booth*, ib.; *Ferres* v. *Ferres*, 2 Eq. Cas. Ab. 695; *Coleby* v. *Smith*, 1 Vern. 205; *Cartwright* v. *Pulteney* 2 Atk. 381; *Baker* v. *Pritchard*, ib. 387; *Clerk* v. *Clerk*, 2 Vern. 412; *Frank* v. *Mainwaring*, 2 Beav. 115; 1 Fonbl. Eq. bk. 1, c. 2, s. 2.

(*x*) *Howard* v. *Digby*, 2 Cl. & F. 661.

(*y*) 18 Edw. 1, st. 4; 10 Edw. 2.

(*z*) 4 Rep. 124 a; 10 Rep. 42 b; 2 Inst. 483; Perk. s. 24; Bac. Abr. tit. "Idiots and Lunatics" (F).

(*a*) Ante, pp. 243, 244.

The authorities in the old books are somewhat contradictory, but they warrant the following propositions.

2. The personal feoffment or grant of a lunatic is void (*b*), or voidable (*c*). Personal feoffment or grant.

3. The feoffment or grant by attorney of a lunatic is void (*d*). Feoffment or grant by attorney.

4. The deed of a lunatic is void (*e*), or voidable (*f*). Deed.

5. The sale or purchase in market overt of a lunatic is valid (*g*). Contract in market overt.

6. The simple contract of a lunatic other than in market overt is void (*h*), or voidable (*i*). Other simple contracts.

In propositions 2, 4, and 6, the alternative form of void or voidable is preserved because, so far as the author can judge, the authorities for the alternative forms are fairly balanced. At the same time, many may think that the recent decision in *Matthews* v. *Baxter* (*k*), that the contract of a drunken person is voidable only, and the criticism applied there to the use of the word "void" by judges in earlier cases, may apply not merely to proposition 6, but to the others also; and that it might be safely said that no act of a lunatic is simply void, but, if not actually valid, at most voidable only: and, indeed, this view is more in keeping with the discretion which the court has exercised Void or voidable.

(*b*) See prop. 4, and 7 & 8 Vict. c. 76, s. 7.

(*c*) *Beverley's case*, 4 Rep. 124; 2 Roll. Abr. Feffment (E), pl. 3; Shepp. Touch. 204, 205.

(*d*) 4 Rep. 125; 2 Roll. Abr. Feffment (E), pl. 4. But an attorney appointed by the principal while sane could deliver seisin though the principal became lunatic. *Jennings* v. *Bragg*, Cro. Eliz. 446; Perk. s. 22.

(*e*) *Thompson* v. *Leach*, Carth. 211, 250, 450, *et ubi sup.* p. 247; cf. *Hudson* v. *Jones*, 4 Bac. Abr. 363; *Abbott* v. *Parsons*, 3 Burr. 1794; *Saunderson* v. *Marr*, 1 H. Bl. 75; *Yates* v. *Boen*, 2 Str. 1104; *Faulder* v. *Silk*, 3 Camp. 126; *Smith* v. *Carr*, *cit. ap.* 2 Sugd. on Powers, ed. 7, p. 179, quod vide; *Snook* v. *Watts*, 11 Beav. 105; *Jacobs* v. *Richards*, 5 De G., M. & G. 55.

(*f*) 4 Rep. 124.

(*g*) 2 Inst. 713.

(*h*) Cf. *Blackbeard* v. *Lindigren*, 1 Cox, 205.

(*i*) See the several propositions following, which imply that such contracts are merely voidable.

(*k*) L. R., 8 Exch. 132.

under the modifying circumstances, presently to be considered, in upholding the contracts of lunatics.

Modern modifications of the above rules.

It will be observed that the above propositions on the abolition of the maxim of self-stultification (*l*) left the interests of honest purchasers and of trade generally exposed to nearly the same dangers as they were exposed to under the original canon. Just then, as the distinction between matters of record and matters *in pais* had been once used, so now other distinctions were used, for the purpose of upholding the contract of a lunatic, where justice or public policy demanded it. The net results of these distinctions appear in the following pages.

Bonâ fide contracts executed, the *status quo ante* being irrecoverable.

7. When a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and which is executed and completed in whole or in part, and the property, the subject-matter of the contract, cannot be restored so as to put the parties *in statu quo*, the contract cannot afterwards be set aside or avoided either by the lunatic or by those who come after him (*m*).

This proposition, toward which some earlier cases had tended, was formulated in *Molton* v. *Camroux* (*n*), an action by the representatives of a deceased lunatic to recover from an assurance office certain moneys paid by him for a life annuity. It was carried a little further, perhaps, in *Beavan* v. *M'Donnell*, where it was held, that when a lunatic had paid a deposit on the purchase of real estate to a vendor who had no knowledge of his lunacy, and the contract itself was fair, he could not recover the deposit.

Conveyances

There is still some doubt how far the proposition above

(*l*) Ante, pp. 244—247.

(*m*) *Molton* v. *Camroux*, 2 Exch. 487; *Baxter* v. *Portsmouth*, 5 B. & C. 170; *Brown* v. *Jodrell*, M. & M., 105; *Price* v. *Berrington*, 3 Mac. & G. 486; *Elliot* v. *Ince*, 7 De G., M. & G. 475; *Hassard* v. *Smith*, I. R., 6 Eq. 429; *Beavan* v. *M'Donnell*, 9 Exch. 309; *Moss* v. *Tribe*, 3 F. & F. 297; *Barrow* v. *Barrow*, Dick. 504 (a marriage settlement); Add. Contr., p. 140; Benj. Sale, ed. 4, p. 33; Poll. Cont. ed. 3, p. 103. *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*n*) *Ubi sup.*; but see *Sergeson* v. *Sealey*, 2 Atk. 412.

stated is applicable to conveyances on sale of real estate or to mortgages. As to the former, the point has never been judicially decided; but in *Price* v. *Berrington* (*o*), Truro, C., said, that if it was necessary to decide whether in the then present state of the law a conveyance executed by a lunatic was absolutely void in the absence of notice and fraud, the case of *Molton* v. *Camroux* would require great consideration upon pronouncing a decision in the affirmative of the proposition; while, in *Elliot* v. *Ince* (*p*), Cranworth, C., after affirming the soundness of the general principle, said, "Perhaps the same may apply to sales of land; Lord Truro seems to think it would; so, at least, I collect from what he says in *Price* v. *Berrington*."

on sale or mortgage of real estate.

With regard to mortgages, the difficulty is due not to absence but to conflict of decisions, so far at least as foreclosure suits are concerned; redemption suits and suits to set aside deeds really fall under proposition 8, presently stated.

Treatment of the mortgages of lunatics in actions for foreclosure.

In *Snook* v. *Watts* (*q*), a suit before Lord Langdale, M.R., in 1848, his lordship apparently held that if the fact of lunacy were proved, that would alone, independently of any question of notice, be sufficient to render the mortgage deed absolutely void.

Snook v. *Watts*.

In *Jacobs* v. *Richards* (*r*), Romilly, M.R., was of opinion that the defendants, the representatives of the lunatic, should have taken some independent step to set aside the deed; but Knight Bruce and Turner, L.JJ., decided that they ought not to be foreclosed without the fact of sanity or insanity at the date of the mortgage deed being determined by a jury, and offered them the choice of an issue or an ejectment.

Jacobs v. *Richards*.

In *Campbell* v. *Hooper* (*s*), Stuart, V.-C., after suggesting that in *Snook* v. *Watts* Lord Langdale could not have had all the cases before him, as he could not have intended to

Campbell v. *Hooper*.

(*o*) 3 Mac. & G. 498.
(*p*) 7 De G., M. & G. 487.
(*q*) 11 Beav. 105.
(*r*) 18 Beav. 300, on an appeal, 5 De G., M. & G. 55, 57.
(*s*) 1 Jur. N. S. 670.

disturb the existing state of the law, and remarking that *Jacobs* v. *Richards* must have been decided by the lords justices on grounds special to that case or by arrangement, finally, without directing an issue, made the usual foreclosure decree.

Whatever opinion may be entertained with regard to the vice-chancellor's criticism, it is submitted that his judgment would be followed now; and if this be so with mortgages, the same principle must apply to conveyances upon sale. As Eldon, C., said, "deeds cannot stand as securities unless they can stand as titles" (*t*); and the converse proposition, so far as the mere validity of the transaction is concerned, seems to be equally true.

Equitable relief not applicable to set aside *bonâ fide* executed contracts.

8. The equitable jurisdiction to set aside contracts in certain cases, once peculiar to chancery, will not be exercised to set aside a contract, conveyance or mortgage executed by a lunatic, in the absence of notice and fraud on the part of the other party; and, less than ever, where from lapse of time or other circumstances it is impossible to reinstate the parties in their original position. The lunatic and his representatives will be left to the legal remedy, if any (*u*).

Niell v. *Morley*.

Niell v. *Morley* (*x*) was a suit by a lunatic and his committee to set aside certain purchases at an auction on the ground of the lunacy of the purchaser, he having been so found three months after the auction from a period three months previous to it, and that without lucid intervals. The master of the rolls, allowing that the purchaser was a lunatic at the time of the sale, but being of opinion that there was nothing to fix the vendor with notice of the

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(*t*) 5 Dow, 243.

(*u*) *Niell* v. *Morley*, 9 Ves. 478; *Sergeson* v. *Sealey*, 2 Atk. 412; *Greenslade* v. *Dare*, 20 Beav. 284; *Price* v. *Berrington*, 3 Mac. & G. 486; *Hassard* v. *Smith*, I. R., 6 Eq. 429; *Kirkwall* v. *Flight*, 3 W. R. 529; *Manby* v. *Bewicke*, 3 K. & J. 342; 1 Story, Eq. Jur. 239; and cf. the case of drunkenness, *Cragge* v. *Holme*, cit. 18 Ves. 14, and 1 Story, Eq. Jur. 244; *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*x*) 9 Ves. 478.

lunacy, and that the transaction was reasonable in itself, declined to interfere.

Price v. *Berrington* (*y*) was a suit to set aside a conveyance of an equity of redemption on a sale by a lunatic. Fraud was alleged, but not proved; the consideration was fair; there was no notice of insanity; the estate had been enjoyed for twenty-seven years, and made the subject of family settlement. Under these circumstances Truro, C., reversing the decision of Wigram, V.-C., declined to grant the relief asked. *Price* v. *Berrington.*

Kirkwall v. *Flight* (*z*) was a suit to set aside a deed executed as a security for moneys advanced at a time subsequent to that from which the mortgagor was found lunatic. The lunacy was admitted, but notice of it denied. Cottenham, C., refused to set aside the deed. *Kirkwall* v. *Flight.*

All the cases hitherto dealt with have been cases in which the contract was for valuable consideration, moving from the same party. This fact creates an essential distinction in regard to the validity of the transaction; in other words, the principle of *Molton* v. *Camroux* (prop. 7) is not applicable to voluntary conveyances nor to any case in which the lunatic is dealing with his own property without valuable consideration. Thus, although a disposition of a lunatic's property by himself may be upheld even in favour of volunteers when the original disposition was for valuable consideration, yet we have a further proposition that—

9. A disposition of a lunatic's property by himself will be set aside even against purchasers for valuable consideration without notice, where the original disposition was made without valuable consideration (*a*). Voluntary dispositions.

In *Sentance* v. *Poole* (*b*), a promissory note in an unusual form and drawn by a person who was imbecile, without *Sentance* v. *Poole.*

(*y*) 3 Mac. & G. 486.

(*z*) 3 W. R. 529.

(*a*) *Clerk* v. *Clerk*, 2 Vern. 412; *Elliot* v. *Ince*, 7 De G., M. & G. 487; *Sentance* v. *Poole*, 3 Car. & P. 1; *Manning* v. *Gill*, L. R., 13 Eq. 485.

(*b*) 3 Car. & P. 1.

consideration, was held bad in the hands of a plaintiff indorsee for value.

Elliot v. *Ince.*

In *Elliot* v. *Ince* (*c*), the lunatic being tenant in tail of copyholds, executed powers of attorney for the purpose of barring the entail; she subsequently mortgaged the property, and was then found lunatic by inquisition from a time overriding the disentailment. In a foreclosure suit, Cranworth, C., held that the entail was not effectually barred, and that this original defect attached even as against a purchaser for valuable consideration without notice.

Analysis of prop. 7.

Returning to proposition 7, it will be observed that four conditions were required—

(i.) The contracting party must have been at the date of the contract apparently of unsound mind and not known to be otherwise.

(ii.) The contract must have been fair and *bonâ fide*.

(iii.) The contract must have been executed or completed in whole or in part.

(iv.) It must be difficult to replace the parties *in statu quo* (*d*).

We may now consider these conditions in isolation, and with regard to (i.) we have this proposition—

Inference from notice of the insanity.

10. Every person dealing with a lunatic, knowing his incapacity, is presumed to perpetrate a meditated fraud upon him and his rights, and fraud is a good ground for avoiding the contract (*e*).

(*c*) 7 De G., M. & G. 475.

(*d*) Cf. *Steed* v. *Calley*, 1 Keen, 620, where an executed contract was set aside because the short time which had elapsed allowed of the parties being easily replaced.

(*e*) 1 Story, Eq. Jur. 238; *Wright* v. *Proud*, 13 Ves. 136; *Lewis* v. *Thomas*, 3 Ha. 26; cf. *Manby* v. *Bewicke*, 3 K. & J. 342, 368; *Price* v. *Berrington*, 7 Ha. 394, 402, per Wigram, V.-C.; and at Common Law, *Faulder* v. *Silk*, 3 Camp. 126; *Baxter* v. *Portsmouth*, 7 D. & R. 617, 618; *Hill* v. *Gray*, 1 Stark. 434; *Brown* v. *Jodrell*, M. & M., N. P. C. 105; *Howard* v. *Digby*, 2 Cl. & F. 662; cf. also *Nottidge* v. *Prince*, 2 Giff. 246; and in cases of intoxication, *Yates* v. *Boen*, 2 Str. 1104; *Drew* v. *Nunn*, 4 Q. B. D. 661.

The knowledge must be brought home to the contracting party; a casual warning is not sufficient (*f*); still less is general reputation admissible to ground the charge of fraud (*g*).

To the presumption of proposition 10 there may be one of two replies; either that the contract related to necessaries; or that the party, although lunatic, enjoyed lucid intervals, in one of which the contract was made. Thus we have the two next propositions—

Necessaries.

11. A lunatic, though not so found, may be under an implied obligation to repay out of his property the cost of necessaries supplied to him (*h*).

What are necessaries.

The proposition applies primarily to obligations to pay for the common necessaries of life supplied to the lunatic himself (*i*). It has been extended to costs properly incurred in obtaining a commission of lunacy (*k*), and in resisting a commission (*l*); and in the former case even where the alleged lunatic was on the inquisition found to be of sound mind (*m*).

(*f*) *Niell* v. *Morley*, 9 Ves. 478, 480.

(*g*) *Greenslade* v. *Dare*, 20 Beav. 290; *et ubi sup.* p. 254, n. (*u*).

(*h*) *Wentworth* v. *Tubb*, 1 Y. & C. C. C. 171; *Baxter* v. *Portsmouth*, 5 B. & C. 172; *Manby* v. *Scott*, 1 Sid. 112; *Dane* v. *Kirkvall*, 8 C. & P. 679; *Ex parte Hall*, 7 Ves. 261; *Nelson* v. *Duncombe*, 9 Beav. 211; *Howard* v. *Digby*, 2 Cl. & F. 663; cf. *Gore* v. *Gibson*, 13 M. & W. 623; Benj. on Sales, p. 33; Poll. on Contr. p. 99; *Carter* v. *Beard*, 10 Sim. 7; *Chappell* v. *Nunn*, 4 L. R., Ir. 316; *In re Weaver*, 21 Ch. D. 615; *In re Newbegins Estate*, 36 Ch. D. 477; *In re Rhodes*, 44 Ch. D. 94.

(*i*) As to the general meaning of the word necessaries, see *Peters* v. *Fleming*, 6 M. & W. 46; *Wharton* v. *Mackenzie*, 5 Q. B. 606, 612; *Ryder* v. *Wombwell*, L. R., 4 Exch. 32. For the respective duties of judge and jury in deciding whether a particular article is a necessary, see *Ryder* v. *Wombwell*, *ubi sup.* and the cases cited therein. The lunatic's social status will be taken into consideration, *In re Rhodes*, 44 Ch. D. 94.

(*k*) *Williams* v. *Wentworth*, 5 Beav. 325; *Re Cumming*, 5 De G., M. & G. 30; *Chester* v. *Rolfe*, 23 L. J., N. S., Ch. 233; *Stedman* v. *Hart*, 23 L. J., N. S., Ch. 908; *Brockwell* v. *Bullock*, 22 Q. B. D. 267.

(*l*) *Wentworth* v. *Tubb*, 7 Jur. 738.

(*m*) *Nelson* v. *Duncombe*, 9 Beav. 211; cf. *Sherwood* v. *Sanderson*, 19

Necessaries supplied to lunatic's wife.

Again, the rule has been extended to make the lunatic liable for necessaries supplied to his wife (*n*), as also for money advanced to her and applied by her in defraying necessary expenses (*o*). At the same time the agency and authority of the wife of a lunatic to pledge the husband's credit do not differ from those ordinarily implied from the relation of husband and wife (*p*).

Acts during lucid intervals.

12. The acts of a lunatic during a lucid interval are valid, though the other contracting party had full notice of the lunacy (*q*).

Accordingly, deeds executed by a lunatic, though confined in a lunatic asylum at the time, and in one instance actually under restraint, have been upheld where the transaction has been fair, disinterested and prudent (*r*). *A fortiori* deeds executed before but in expectation of insanity may be upheld (*s*).

Partial insanity.

It may be added, that lunacy being often not merely intermittent but partial, it might be argued, that the particular delusion did not affect the capacity of the party to enter into the contract; the presumption, however, is against the capacity (*t*).

Transaction must be fair and *bonâ fide*.

13. Every person dealing with a lunatic, even though no notice of the lunacy can be brought home to him, must, in order that the transaction may be supported, show that it was fair and *bonâ fide* (*u*).

Ves. 280; cf. further, *Re Clegg*, 1 Ir. Jur. N. S. 87; *Ex parte Hill*, Coop. 54.

(*n*) Story, Contr. p. 81; *Read* v. *Legard*, 6 Exch. 636; cf. *Chester* v. *Rolfe*, 4 De G., M. & G. 798.

(*o*) *Davidson* v. *Wood*, 1 De G., J. & S. 465; and in the court below, 2 N. R. 15; 11 W R. 561.

(*p*) *Richardson* v. *Dubois*, L. R., 5 Q. B. 51; *Chappell* v. *Nunn*, 4 L. R., Ir. 316; *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*q*) Bract. f. 420; 4 Rep. 125 a; *Att.-Gen.* v. *Parnther*, Br. C. C. 441; cf. ap. *Towart* v. *Sellars*, 5 Dow. P. C. 231; *Selby* v. *Jackson*, 6 Beav. 192; Story, Contr. pp. 64—66 and notes.

(*r*) *Selby* v. *Jackson*, *ubi sup.*

(*s*) *Faulder* v. *Silk*, *cit. ap.* 5 Dow, 238; cf. *Myddleton* v. *Kenyon*, 2 Ves. jun. 391.

(*t*) 1 Story, Contr. pp. 64, 65.

(*u*) 1 Fonbl. Eq. bk. 1, c. 2, s. 3; 1 Story, Eq. Jur. 234—248; *Blackford* v. *Christian*, 1 Knapp, 73, 77; *Clarkson* v. *Hanway*, 2 P.Wms. 203;

This rule extends not merely to lunatics in the strict sense, but to those who, though not within the reach of an inquisition, are yet of weak understanding.

What is fair and *bonâ fide*.

A contract will not be deemed fair and *bonâ fide*, within the meaning of the above rule, where the consideration is inadequate or unconscionable, or the act without deliberation or independent advice, or where, again, there is negative misrepresentation or *suppressio veri*, though not sufficient to give ground for relief in ordinary cases, or where the parties stand in fiduciary relations to one another (*x*).

Executory contracts.

14. A merely executory contract will not be enforced against one who was of unsound mind at the date of the contract (*y*).

But the other party is entitled to an issue, even though the lunatic have been so found since; and if the verdict is in favour of sanity at the date of the contract, he will be entitled to specific performance or other relief, unless rendered impossible by subsequent insanity (*z*). A contracting purchaser, *e.g.*, might insist on specific performance, even when he could get no title by conveyance but the declaration of the court merely (*a*). The committee of a lunatic so found may now be directed to execute the contracts of the lunatic entered into before the finding (*b*).

Contracts executory

Again, a contract which is executory for one purpose may be executed for another, and so far therefore binding.

Gartside v. *Isherwood*, 1 B. C. C. App. 559—561; *Hassard* v. *Smith*, I. R., 6 Eq. 429; cf. *Dane* v. *Kirkwall*, 8 C. & P. 679.

(*x*) In support of these positions the reader is referred to the treatises on Equity, *e.g.*, 1 Story, Eq. Jur. p. 258 *et seq.* See, too, *Osmond* v. *Fitzroy*, 3 P. Wms. 129, and Mr. Cox's note; *Fox* v. *Mackreth*, White & Tudor's L. C. in Eq., vol. i. p. 141; *Huguenin* v. *Baseley*, 14 Ves. 273; *Nottidge* v. *Prince*, 2 Giff. 246; *Lyon* v. *Home*, L. R., 6 Eq. 655.

(*y*) 1 Story, Contr. 77, 78; 1 Story, Eq. Jur. 241; *Niell* v. *Morley*, 9 Ves. 478, 482; *Sergeson* v. *Sealey*, 2 Atk. 412; *Price* v. *Berrington*, 3 Mac. & G. 486; *Molton* v. *Camroux*, 2 Exch. 487.

(*z*) *Hall* v. *Warren*, 9 Ves. 605; *Owen* v. *Davies*, 1 Ves. sen. 82; *Pegge* v. *Skynner*, 1 Cox, 23.

(*a*) *Hall* v. *Warren*, *ubi sup.*

(*b*) 53 Vict. c. 5, s. 120 (*i*).

for one purpose, executed for another.

A deposit of part of the purchase-money, followed by a performance on the part of the vendor of the acts required of him by the conditions of sale, constitutes an executed contract so far as the deposit money is concerned, and on the non-performance of the contract by the lunatic purchaser makes the deposit money the property of the vendor (*c*).

Terms on which the contract will be avoided.

An executory contract may be declared void at the instance either of the lunatic or of the other party, but in the former case, at least, the lunatic will be bound to restore the other party to his former position by payment or allowance of costs and otherwise (*d*).

Test of Responsibility for Civil Acts.

Standard not exactly the same as that for a commission.

It has long been decided that a man need not fall within the exact legal definition of a lunatic or idiot, nor indeed be necessarily a proper subject for an inquisition of lunacy, in order that his deed may, in the abstract, be held voidable at law (*e*). It is true that some of the equity judges seem at times to have been of a different opinion, referring to the condition of mind which would warrant a commission as the standard by which the capacity of the alleged lunatic is to be measured (*f*). These, however, are but *dicta*, and a decision of the House of Lords is opposed to them (*e*).

The standard in equity and at law said to be identical.

For themselves the courts of equity have ever protested that their standard is the same as that of law. Courts of equity would not measure men's heads; there was no such thing as equitable incapacity where there was legal capacity. These and similar phrases were frequently repeated or cited with approval (*g*). At the same time, by the ordinary juris-

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(*c*) *Beavan* v. *M'Donnell*, 9 Exch. 309.

(*d*) *Frost* v. *Beavan*, 22 L. J., N. S., Ch. 638.

(*e*) *Mannin* v. *Ball*, Sm. & B. 183, 454.

(*f*) See *e.g. Osmond* v. *Fitzroy*, 3 P. Wms. 129, 130.

(*g*) *White* v. *Small*, 2 Ch. Cas. 103; *Bridgman* v. *Green*, 2 Ves.

diction which these courts exercised in cases of fraud, they were called upon to give relief where the mental condition of a contracting party, though not such as would *per se* entitle him to avoid his deed or contract, was yet so weak as to make him a ready object for fraud, and circumstances implying fraud were actually disclosed. In such a case the mental weakness was itself one of the circumstances which, in combination with others, compelled the court, according to its ordinary principles, to impute fraud, and on that account to give its ordinary relief (*h*).

The prodigal not within the scope.

But neither courts of law nor courts of equity followed the civil law in classing the prodigal with the madman, or drawing a line between liberality and profusion. Assuming the absence of fraud and the existence of a consenting will, then, however unreasonable the transaction, *stat pro ratione voluntas* (*i*).

The facts, which would formerly have afforded ground for relief in equity, will now of course have the same effect in all branches of the High Court.

Evidence.

The mental condition of a person who seeks to avoid the consequences of his own civil acts must be determined, as far as possible, down to the actual date of the act or contract. Evidence of his mental condition before and after that date is, as usual, admissible for the purpose of determining the nature of the disease and the probability of its betraying its existence to the parties dealing with him (*k*).

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sen. 627; *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Bennett* v. *Vade*, 2 Atk. 325; *Nantes* v. *Corrock*, 9 Ves. 181, 182; *Willan* v. *Willan*, 16 Ves. 72; *Blachford* v. *Christian*, 1 Knapp, 73; *Griffith* v. *Robbins*, 3 Madd. 191.

(*h*) See 1 Story, Eq. Jur. 258 *et seq.* and notes; *Osmond* v. *Fitzroy*, 3 P. Wms. 129 and Mr. Cox's note; *Fox* v. *Mackreth*, 1 Wh. & Tud. L. C., p. 141.

(*i*) *Blachford* v. *Christian*, 1 Knapp, 77; *Gartside* v. *Isherwood*, 1 B. R. C. C App. 560, 561; *Bath and Montague's case*, 3 Ch. Cas. 103; 1 Fonbl. Eq. bk. 1, c. 2, s. 3.

(*k*) Ante, p. 256, prop. 10; post, Bk. IV.

Form of issue.

A person who is found to have been, at the date of the act or contract, a suitable subject for an inquisition, or, in other words of unsound mind and incapable of managing himself and his affairs, is clearly insane for the purpose of obtaining relief against the act or contract. But that form of issue is, as above suggested (*l*), hardly accurate, and the form usually adopted is this,—"Was the alleged lunatic at the date in question capable of understanding the nature of the act he was performing?" (*m*).

When mental weakness is supplemented by other circumstances suggestive of fraud, whether inadequacy of consideration, misrepresentation, concealment, or some peculiar relation between the parties, the question, "Had the party a mind adequate to the business he was about?" seems sufficient to meet the case (*n*).

Issue usually directed by the equity courts.

An issue was commonly directed by the courts of equity, where the sanity of any person was in question (*o*), though the judge might decide the point himself (*p*). Under the Judicature Acts, there is power in the court to direct an issue when required (*q*), as well as in the parties themselves to determine whether the cause shall be tried by a judge with a jury or by a judge alone (*r*).

(*l*) Ante, p. 260.

(*m*) *Mannin* v. *Ball*, *ubi sup.* p. 260, n. (*e*); cf. 1 Story, Contr. p. 71.

(*n*) 1 Foubl. Eq. bk. 1, c. 2, s. 3; 1 Story, Eq. Jur. 258; *Gibson* v. *Jeyes*, 6 Ves. 273.

(*o*) *Clerk* v. *Clerk*, 2 Vern. 412; *Grindley* v. *Davies*, *cit. ap.* Shelford, 348; *Murley* v. *Templeman*, ib. p. 349; *Niell* v. *Morley*, 9 Ves. 478; *Middleton* v. *Sherburne*, 4 Y. & C. 358; *Price* v. *Berrington*, 3 Mac. & G. 486, 491; *Frank* v. *Mainwaring*, 2 Beav. 115; 4 Beav. 37; *Snook* v. *Watts*, 11 Beav. 105; *Jacobs* v. *Richards*, 5 De G. M. & G. 55; *Burke* v. *O'Malley*, Beatty, 96; and comp. *Richards* v. *Symes*, 2 Atk. 319; *St. Paul's* v. *Morris*, 9 Ves. 155; *Pemberton* v. *Pemberton*, 11 Ves. 50; *Hampson* v. *Hampson*, 3 V. & B. 41.

(*p*) *Addison* v. *Dawson*, 2 Vern. 678; *Evans* v. *Blood*, 3 B. P. C. 632; *Snook* v. *Watts*, 11 Beav. 110.

(*q*) R. S. C. 1883, Ord. XXXVI. r. 44.

(*r*) Ib. r. 7.

It is to be observed (i.) that contracts and obligations which a man has entered into before he becomes lunatic are not avoided by the lunacy (*s*) although, where the lunacy makes performance impossible, it may afford ground for relief (*t*); (ii.) that in all cases in which the contract has been voidable only, the lunatic may on his recovery rectify, by acquiescence or an overt act, contracts entered into by him during his lunacy (*u*).

Contracts entered into before lunacy not avoided by lunacy.

Voidable contracts may be ratified by acquiescence or recovery.

(*s*) *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*t*) *Pegge* v. *Skynner*, 1 Cox, 23; *Hall* v. *Warren*, 9 Ves. 605; *Owen* v. *Davies*, 1 Ves. sen. 82; *Affleck* v. *Affleck*, 3 Sm. & G. 394.

(*u*) Cf. *Matthews* v. *Baxter*, L. R., 8 Exch. 132; cf. Co. Litt. 2 b; 2 Vent. 203; 2 Bl. Comm. 291, 292; Bac. Abr. Idiot & Lunatic (D).

CHAPTER II.

INSANITY IN RELATION TO MARRIAGE (*a*).

SECT. 1.—*When the Marriage itself is impeached.*

Rule of the civil law.

BY the civil law, in order that a marriage may be valid, it is necessary that both the contracting parties shall be of sound mind; if either party is insane the marriage is void (*b*). The insanity to be a disqualification must, however, exist at the time of the marriage, which, if celebrated during a lucid interval, is binding (*c*). Partial insanity, when existing on a subject in no way connected with or relating to the marriage, is, according to the better opinion, no hindrance to its validity (*d*).

The common law.

The common law of England was not always in harmony with these rational principles (*e*). That idiots could consent to a marriage is mentioned (*f*) as a point adjudged in one case (*g*), and seems confirmed by the rule allowing dower to the wife of an idiot (*h*), and by the fact that the right of an idiot's husband to curtesy was merely questioned where, on account of an office finding the wife's idiocy, and the descent of land to her after the marriage, it was apprehended that there was a concourse of titles between the crown and her husband (*i*). This being so, *a fortiori* would it seem that lunatics could consent to

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(*a*) Cf. generally Phill. Eccl. Law, vol. i. 720 *et seq.*

(*b*) Sanchez de Mat. 1, 8, 15.

(*c*) Ib. 1, 8, 16.

(*d*) Ib. 1, 8, 22, 23.

(*e*) 1 Bl. Comm. 426.

(*f*) *Stile's case*, Trin. 3 Jac. B. R.; 1 Rolle's Ab. 357; Shepp. Abr. tit. Idiot; Harg. Co. Litt. 80 a, n. (1).

(*g*) Hawk. Abr. Co. Litt. 42.

(*h*) Co. Litt. 30 b, and n. (2) by Harg.; Bac. Abr. Idiot & Lunatic (D).

(*i*) Ib.

marriage even during an actual state of insanity. Of their competence to do so during a lucid interval there was not nor is any doubt.

15 Geo. 2, c. 30.

By the statute 15 Geo. 2, c. 30 (extended to Ireland by 51 Geo. 3, c. 37), marriages with lunatics so found by inquisition were declared void *ab initio*, whether they were celebrated during a lucid interval or not (*k*). This act was repealed by 36 & 37 Vict. c. 91, and the law applicable to the marriage of lunatics, whether so found or not, now stands on one basis. This is simply that marriage is a civil contract, and like all other civil contracts will be invalidated by want of consent of capable persons (*l*). *Consensus non concubitus facit matrimonium* (*m*), and this disability of the party makes the contract void *ab initio*, and not merely voidable. It does not dissolve a contract already made, but it renders the parties incapable of contracting at all; it does not put asunder those who are joined together, but previously hinders the junction; and if any persons under this incapacity come together, it is a meretricious and not a matrimonial union, and therefore no sentence of avoidance is necessary (*n*).

Repealed.

Present basis of the rule.

Contempt to marry a lunatic so found.

The person who marries one found lunatic by inquisition is guilty of a contempt of the court of lunacy, and renders himself liable to be committed (*o*); if the marriage is afterwards confirmed, the court will secure the property of the lunatic, as is usual in the case of wards of court (*p*).

Time at which the state of mind requires to be determined.

In every case the fact of incapacity to contract must be established by evidence and the usual presumptions arise;

(*k*) *Turner* v. *Meyers*, 1 Hagg. Cons. Rep. 414—417.

(*l*) *Turner* v. *Meyers*, *ubi sup.*; *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 359; *Browning* v. *Reane*, 2 Phill. Eccl. Rep. 69; *Hancock* v. *Peaty*, L. R., 1 P. & D. 335; and cf. *Ex parte Ferne*, 5 Ves. 832; *Harrod* v. *Harrod*, 1 K. & J. 4, 17.

(*m*) *Harford* v. *Morris*, 2 Hagg. Cons. Rep. 423, 427.

(*n*) Per Sir J. Nicholl in *Elliott* v. *Gurr*, 2 Phill. Eccl. Rep. 19.

(*o*) *Mrs. Aske's case*, Prec. in Chanc. 203.

(*p*) *Packer* v. *Wyndham*, Prec. in Ch. 412; *Nightingale* v. *Lockman*, Mos. 231.

and as by the civil law so by our own, it is the state of the party's mind at the time of the marriage which is decisive of the validity of the marriage (*q*). So the fact of one of the parties having been insane *before* the promise was made is no answer to an action founded on breach of a promise to marry (*r*).

Unsoundness of mind.

Dulness of intellect.

Next, as to the degree of incapacity which will vitiate a marriage; and herein observe the distinction drawn in *Harrod* v. *Harrod* (*s*), between unsoundness of mind on the one hand and mere dulness of intellect on the other.

What amount of actual insanity invalidates a marriage.

1. Of the incapacity arising from actual insanity, Sir J. Nicholl said that it must be such that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property (*t*). Sir W. Scott said that it must be something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns (*u*); while in *Hancock* v. *Peaty* (*x*), Sir J. Hannen said, "If the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power." The capacity required was said by the same judge, in a later case of *Durham* v. *Durham* (*y*), to be "a capacity to understand the nature of the contract and the duties and responsibilities which it creates." He added that the contract was not one which required a large degree of intelligence to comprehend. From these cases it would appear that the

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(*q*) *Parker* v. *Parker*, 2 Lee, 382; *Ex parte Ferne*, 5 Ves. 832; *Ellis* v. *Bowman*, 17 L. T. 11; *Le Geyt* v. *O'Brien*, Milw. Eccl. Rep. 334; *Hancock* v. *Peaty*, L. R., 1 P. & D. 335, 337.

(*r*) *Baker* v. *Cartwright*, 30 L. J., N. S., C. P. 364.

(*s*) 1 K. & J. 4, 15.

(*t*) *Browning* v. *Reane*, 2 Phill. Eccl. Rep. 69, 70.

(*u*) *Turner* v. *Meyers*, 1 Hagg. Cons. Rep. 414, 418.

(*x*) L. R., 1 P. & D. 335, 341.

(*y*) 10 P. D. 80.

standard of incapacity for this purpose resembles the standard warranting a commission of lunacy rather than that which would avoid an ordinary contract, still less a will, or create criminal irresponsibility, and that partial insanity would be sufficient to produce this effect. This differs materially from the rule of the civil law, which, as has already been stated, according to the best opinions, upholds marriages entered into by the partially insane, if the insanity is irrespective of the subject-matter or persons concerned in the contract (*z*). It is submitted that in the absence of fraud and of notice of the lunacy to the other contracting party, an application to annul a marriage, a contract the external ceremony of which is so imposing, and the character, rights and obligations of which are so familiar, should not be successful except by consent (*a*).

The onus of showing that a person entering into the contract of marriage was incapable of understanding the nature of the contract, lies on the party impeaching the validity of the marriage (*b*).

Weakness of mind accompanied by fraud.

2. When weakness of mind, not amounting to insanity, is relied on, then the question becomes one of fraud; and it is well established that such weakness, circumvented by proportionate fraud, will vitiate the fact of marriage (*c*). Where the fraud is clearly proved, weakness of mind may be presumed from the tender years of the party (*d*).

By whom proceedings to set aside marriage may be brought.

Proceedings to set aside a marriage, on the ground of the incapacity of a contracting party, may be brought—

(i.) By the contracting party upon the recovery of rea-

(*z*) Sanchez de Matrim. 1, 8, 23: "*Perspecto an discernere nôrint inter bonum et malum, id enim indicium est mentis constantiæ.*" Ibid.

(*a*) Conf. per Page Wood, V.-C., in *Harrod* v. *Harrod*, 1 K. & J. 16; *Durham* v. *Durham*, 10 P. D. 80.

(*b*) *Durham* v. *Durham*, 10 P. D. at p. 98.

(*c*) *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 358, 359; *Harford* v. *Morris*, 2 Hagg. Cons. Rep. 423, 436; et vide *Fust* v. *Bowerman*, ib. 436, n.; *Hull* v. *Hull*, 15 Jur. 710.

(*d*) *Harford* v. *Morris*, *ubi sup.*

By contracting party on recovery.

son (*e*). As long ago as 1808, it was held by Sir W. Scott, in the Consistory Court, that that party might come forward to maintain his own past incapacity; nor, supposing that party to have been at the time of the marriage of age and *sui juris*, and to have become sane at the time the proceedings are taken, is there any other person who can institute them on his or her behalf. In such a case, where the suit was brought by a father, to set aside a son's marriage, it was said that no evidence would be sufficient to induce the court to pronounce against the sanity of an act to which the man himself not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved (*e*).

However, the degree of proof must be stronger than the ordinary evidence of insanity which has been already adverted to, when a person brings a suit or allegation of his own incapacity, by exposing to view the changes of his own mind (*f*).

By guardian where contracting party a minor.

(ii.) Where the contracting party is a minor, the suit may be properly instituted by his guardian, duly elected and appointed (*g*), whether the contracting party has recovered his reason or not; but it must appear on the face of the petition whether the party who acts as guardian is acting in that capacity or on his own behalf.

By the committee of the estate when lunatic so found.

(iii.) Where the contracting party has once been made, and still is, the subject of a commission of lunacy, and a committee of his estate has been appointed, the committee is the proper person to institute the proceedings (*h*). It was said, in one case, that it is not necessary for the committee to resort to the judge in lunacy for the purpose of exercising an authority to institute proceedings in the Con-

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(*e*) *Turner* v. *Meyers*, 1 Hagg. Cons. Rep. 414; cf. *Hancock* v. *Peaty*, L. R., 1 P. & D. 335.

(*f*) Ib. 418.

(*g*) Conf. *Fust* v. *Bowerman*, *cit. ap.* 2 Hagg. Cons. Rep. 171.

(*h*) *Portsmouth* v. *Portsmouth*, 3 Add. 63; *Fust* v. *Bowerman*, *cit. ap.* 2 Hagg. Cons. Rep. 171; *Parnell* v. *Parnell*, ib. 169; *Woodgate* v. *Taylor*, 30 L. J., N. S., P. M. & A. 197; Divorce Rules, 196.

sistory Court (*i*). The court, indeed, may be bound to entertain a suit, when the committee has determined to bring it, having no discretion to refuse it (*k*). But the custom and expediency prescribe that the sanction of the judge should be previously obtained (*l*); while it will be remembered that if the committee proceeds without that sanction he does so at his own risk (*m*).

By curator or guardian.

(iv.) Where the contracting party has not recovered from insanity, but is otherwise *sui juris*, and is not subject to a commission of lunacy, the proceedings may be instituted by a *curator* or guardian duly elected and appointed (*n*).

Continuation of proceedings by person himself after recovery and attaining his age.

(v.) Where the contracting party, being a minor, becomes of age, and is then of sane mind, or being already of age becomes of sound mind during the continuance of a suit instituted by a *curator* or guardian, it is proper for the proceedings to be continued by the contracting party (*o*). At the same time, the court will not, on the representation of the opposing party at the hearing, allow an adjournment of the case for the purpose of ascertaining that recovery. The case will be allowed to proceed, but the decree will be reserved until the court is informed as to the condition of

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(*i*) *Parnell* v. *Parnell*, *ubi sup.*

(*k*) Ib.

(*l*) *In re Smith*, *In re Portsmouth*, *cit. ap.* Shelf. on Lun., pp. 578, 579; *Ex parte Turing*, 1 V. & B. 140; and in *Mordaunt* v. *Moncreiffe*, per Kelly, C.B., L. R., 2 Sc. & Div. App. 374, 383; conf., too, *Woodgate* v. *Taylor*, 30 L. J., N. S., P. M. & A. 197, n.

(*m*) Conf. ante, p. 160.

(*n*) The appointment of guardians *ad litem* for persons of unsound mind is not directly authorized by 20 & 21 Vict. c. 85, although provision is made for the guardianship *ad litem* of minors: *Mordaunt* v. *Moncreiffe*, L. R., 2 Sc. & Div. App. 374, 393, 394; and conf. *Fust* v. *Bowerman*, *cit. ap.* 2 Hagg. Cons. Rep. 171; and, finally, *Hancock* v. *Peaty*, L. R., 1 P. & D. 335, where the order for the appointment of a guardian *ad litem* is given. It is doubtful whether Rule 196 of the Divorce Rules applies to a person who has not been found lunatic. *Fry* v. *Fry*, 15 P. D. 50.

(*o*) *Fust* v. *Bowerman*, *cit. ap.* 2 Hagg. Cons. Rep. 171; *Hancock* v. *Peaty*, L. R., 1 P. & D. 335; *et ubi sup.* p. 266, n. (*q*).

the party, who must then judge for himself as to whether he will allow the cause to proceed to a decree (*p*).

After death of lunatic by any one having an interest.

(vi.) Where the contracting party is dead at the time the proceedings are taken to declare the marriage null and void, they may be taken by any person having an interest, and the question may arise in any division of the High Court (*q*).

Alimony.

In all suits of nullity of marriage brought by or on behalf of the husband, the wife *de facto* is regularly entitled as well to alimony pending the suit as to the payment of all such proper costs as she incurs in her defence. So fixed is this rule, that the ecclesiastical courts would not proceed in the suit until proper provision had been made for these purposes, even where fraud was imputed to the wife in procuring the marriage; and it extends to cases in which the suit is instituted by the committee of the lunatic on his behalf (*r*). A provision by way of alimony is not assignable (*s*).

Sect. 2.—*Where Marriage once validly contracted.*

Supervening insanity no dissolution.

Where a marriage has once been validly contracted, supervening insanity will not, either by the civil law (*t*) or by our own (*u*), operate as a dissolution of the bond. Neither does it afford ground for a decree of dissolution of marriage or even of judicial separation (*x*).

Usual incidents of marriage continue not-

So where the marriage has once been validly contracted the usual incidents belonging to it attach and continue, notwithstanding the subsequent insanity of either party;

(*p*) *Hancock* v. *Peaty*, *ubi sup.*

(*q*) *Browning* v. *Reane*, 2 Phill. Eccl. Rep. 69; *Parker* v. *Parker*, 2 Lee, 382.

(*r*) Shelf. Marriage, pp. 586 *et seq.*; *Portsmouth* v. *Portsmouth*, 3 Add. 63; *Smith* v. *Smith*, cit. ib.

(*s*) *In re Robinson*, 27 Ch. D. 160.

(*t*) Sanchez de Matrim. 1, 8, 15.

(*u*) Cf. *Hayward* v. *Hayward*, 1 Sw. & Tr. 81, 84; *Hall* v. *Hall*, 3 Sw. & Tr. 347, 349.

(*x*) *Hall* v. *Hall*, *ubi sup.*

though, where the marriage is null and void from the first, these incidents do not attach nor in fact ever arise (*y*). withstanding supervening insanity.

A wife, then, is entitled to dower whether she or her husband become lunatic; a husband is entitled to be tenant by the curtesy whether he or his wife become lunatic; in all cases where, had there been no disability on either side, these rights would have existed; and the obligation ordinarily imposed upon a husband of maintaining his wife is not removed by her lunacy or by his own (*z*). Dower. Curtesy.

So where a chose in action or other personalty belonging to the wife is brought into court to the credit of the husband's lunacy, this is sufficient reduction into possession to destroy the wife's right of survivorship (*a*). Reduction into possession of chose in action.

On the other hand, the wife may, notwithstanding her husband's lunacy, commence an action to establish her equity to a settlement as in other cases (*b*). Where the lunatic has been so found, his committee must obtain the direction of the court of lunacy through the masters' office, and will probably be directed to bring in proposals for a settlement. The wife may do the same. The master will then approve of a proper settlement and indicate his approval in the usual way (*c*). Equity to a settlement.

The approval of the master does not bind the wife, although she may have been a party to the proceedings in the lunacy, and if her husband die before completion she may retire from the settlement (*d*). So, too, it would seem that, if dissatisfied with the arrangement approved by the master, she might press her action to a hearing before the regular court, provided that she has not been a Wife how far bound by lunacy proceedings.

(*y*) Co. Litt. 30 b, and Harg. note; Bac. Abr. tit., Idiot & Lunatic (D). As to wife taking possession of husband's chattels, see *In re Williams*, 50 L. J., N. S., Ch. 495.

(*z*) *Brodie* v. *Barry*, 2 V. & B. 39.

(*a*) *Re Jenkins*, 5 Russ. 183.

(*b*) *In re Dixon's Trusts*, 48 L. J., N. S., Ch. 592; the M. W. Property Act, 1882, has greatly diminished the importance of this branch of the law.

(*c*) *Baldwin* v. *Baldwin*, 5 De G. & S. 319.

(*d*) Ib.

party to the lunacy proceedings. Having once submitted to the lunacy jurisdiction, however, she would probably be restrained by that court from continuing her action (*e*).

Alienation by *feme covert* under Fines and Recoveries Act.

The concurrence of the lunatic husband of a married woman entitled to real property in her own right in a deed disposing of it may, when necessary, be dispensed with by order of the High Court (*f*).

Evidence.

It must be shown to the satisfaction of the court that there is actual insanity (*g*) existing at the time of the application (*h*), and that the transaction will not tend to interfere with the lunatic's maintenance (*i*). At the same time, where the property is purely separate estate, slight evidence of insanity is sufficient (*k*).

Arrears of pin-money, or separate income of lunatic *feme covert*.

The ordinary rules relating to the arrears of pin-money, as well as of income of separate estate (*l*), undergo some modification where the wife is a lunatic (*m*). The husband's estate is, in the first instance, liable for all arrears of pin-money, and for all the income of the wife's separate estate received by him, but account is usually directed to be taken of all extraordinary expenses incurred by the husband on the wife's behalf and which she might reasonably have been expected, had she been sane, to have met out of her pin-money or separate estate, and these are deducted out of whatever is found due from the estate of

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(*e*) Cf. ante, p. 94.

(*f*) 3 & 4 Will. 4, c. 74, s. 91.

(*g*) *Re Murphy*, 5 Scott, N. R. 166. There should be an affidavit by a medical man; and an affidavit showing the result of the application to the husband to execute an affidavit by another verifying his certificate is not sufficient. *Re Reeves*, 24 W. R. 848; *In re the Trusts of Clare's Will*, 49 L. J., N. S., C. P. D. 557.

(*h*) *Re Turner*, 3 C. B. 166.

(*i*) *Ex parte Cloud*, 3 N. R. 429.

(*k*) *Ex parte Saunders*, 3 N. R. 82; and see M. W. Property Act, 1882; s. 1, sub-s. (1).

(*l*) *Townshend* v. *Windham*, 2 Ves. sen. 7; *Peacock* v. *Monk*, id. 190; *Offley* v. *Offley*, Pre. Ch. 26; *Parkes* v. *White*, 11 Ves. 225; *Thrupp* v. *Harman*, 3 Myl. & K. 513; *Smith* v. *Camelford*, 2 Ves. jun. 698; *Fowler* v. *Fowler*, 3 P. Wms. 354; *Acton* v. *Acton*, 1 Ves. sen. 267; *Ridout* v. *Lewis*, 1 Atk. 269.

(*m*) *Brodie* v. *Barry*, 2 V. & B. 39.

the husband for arrears of pin-money or income of separate estate received by him on his wife's behalf (*n*).

Secondary rights, how far enforceable.

Whether in cases where the offending party is a lunatic, the secondary rights, the rights which arise out of wrongs suffered, exist, or, at any rate, admit of being enforced, is a difficult question. The enforcement of these rights has, though not perhaps a penal character, at least a penal as well as a remedial effect (*o*); and it would seem contrary to the spirit of the law and of justice to visit with punishment the conduct of an irresponsible agent.

Insanity when an answer to charges of misconduct.

Accordingly, the presence of insanity will be an answer to many charges of misconduct in the marriage state (*p*); it is distinct from violence of disposition, want of moral restraint, eccentricity, or any other peculiar source to which the misconduct of the spouse may be attributed. The sources of such misconduct are for the most part immaterial. If bitter waters are flowing it is not necessary to inquire from what source they spring (*q*). Cruelty does not cease to be a cause of suit if it proceed from violent and disorderly affections, as was said in one case (*r*), or from violence of disposition, want of moral control or eccentricity, as was said in another, or from a liability to become excited in controversy in the language of a third (*s*); but madness, *dementia*, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the

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(*n*) *Howard* v. *Digby*, 2 Cl. & F. 634; reversing, on appeal, *Digby* v. *Howard*, 4 Sim. 588; 2 C. P. Coop. 187, n.; *Re Hewson*, 21 L. J., N. S., Ch. 825. For the effect of the lunacy of a feme covert, on the application of separate estate for maintenance, vide ante, pp. 154, 237, 238; for husband of feme covert executrix, a lunatic, post, Bk. II. c. 6; for husband of feme covert defendant, a lunatic, post, Bk. II. c. 9, s. 3, pl. 7.

(*o*) *Mordaunt* v. *Moncreiffe*, L. R., 2 Sc. & Div. App. 374.

(*p*) *Hall* v. *Hall*, 3 Sw. & Tr. 347.

(*q*) *White* v. *White*, 1 Sw. & Tr. 592; cf. *Hayward* v. *Hayward*, 1 Sw. & Tr. 81.

(*r*) *Dysart* v. *Dysart*, 1 Rob. 116.

(*s*) *Hayward* v. *Hayward*, 1 Sw. & Tr. 81.

remedy lies in the restraint of the husband, not the release of the wife (*t*).

Insanity when not an answer to charges of misconduct.

To bring the case within the principle of the rule just stated, the misconduct must have been consequent upon the insanity. A decree for judicial separation may be made though it be shown that the respondent has been repeatedly in confinement as an insane person, if it appears that the insane attacks have been the consequence of the misconduct (*u*). Nor, again, does the reason of the rule extend to a case in which the character of the respondent's malady is such as is likely to repeatedly recur in a form which threatens the safety of the petitioner, without admitting of the protection to be obtained against ordinary insanity, as *e.g.*, *delirium tremens* (*x*). The principle of these cases would seem to be equally applicable to the case of adultery.

Plea of insanity not an answer to an action for restitution of conjugal rights.

On the other hand, a plea of insanity in the petitioner, and of threatened danger to the respondent therefrom, is not an answer to a petition for the restitution of conjugal rights. "A husband is not entitled to turn his lunatic wife out of doors. He may be rather bound to place her in proper custody, under proper care, but he is not entitled to turn her out of his house. He is less than ever justified in putting her away, if she has the misfortune to be insane" (*y*). In *Hayward* v. *Hayward*, the parties were curiously at cross purposes. The husband met a claim on the part of his wife for the restitution of conjugal rights by a plea alleging her insanity and certain acts which threatened him with danger in the future. The wife denied the insanity without explicitly denying the acts. The case of each party was its own answer. If the wife was insane, the acts were immaterial; while, on the other hand, if she was not insane, her acts would bar the relief. The court

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(*t*) *Hall* v. *Hall*, *ubi sup.* n. (*p*).

(*u*) *White* v. *White*, *ubi sup.* n. (*q*).

(*x*) *Curtis* v. *Curtis*, 1 Sw. & Tr. 192, 213; *Marsh* v. *Marsh*, 1 Sw. & Tr. 312.

(*y*) *Hayward* v. *Hayward*, 1 Sw. & Tr. 81, 84.

solved the difficulty by assuming that the acts had been denied (*z*).

The case is not so clear where the acts which form the ground for relief are the acts of a sane person, and the person aggrieved is a lunatic, or the wrongdoer becomes lunatic before the proceedings are taken.

Proceedings by committee against the wife for adultery.

The rule has indeed been long well established that the committee of a lunatic so found may institute proceedings against the wife of the lunatic for adultery.

In *Parnell* v. *Parnell* (*a*), a divorce *a mensâ et thoro* was obtained by the committee, that being, in fact, the only remedy which could then be obtained without a private act of parliament.

In *Woodgate* v. *Taylor* (*b*), which was subsequent to 20 & 21 Vict. c. 85, the committee, in accordance with the direction of the lord chancellor in lunacy, applied only for a judicial separation.

The lunacy of husband or wife is, as the law now stands, no bar to a suit for dissolution of marriage brought either by or against the lunatic spouse (*c*), and it seems that such a suit should be instituted by the committee of the estate (*d*) who will previously obtain the consent of the judge in lunacy.

The remedy of dissolution of marriage is open, notwithstanding the insanity of the offending spouse at the date of the proceedings, which may be continued nevertheless, at any rate when the insanity is incurable (*e*).

(*z*) *Hayward* v. *Hayward*, 1 Sw. & Tr. 81.

(*a*) 2 Hagg. Cons. R. 169.

(*b*) 30 L. J., N. S., P. M. & A. 197.

(*c*) *Mordaunt* v. *Moncreiffe*, *ubi sup.*; *Baker* v. *Baker*, 5 P. D. 142.

(*d*) *Baker* v. *Baker*, *ubi sup.* at page 152, where Sir James Hannen said that the question whether the suit was instituted by the committee of the estate or of the person was one of discretion to be exercised by the judge in lunacy, and added: "They (the lords justices) probably considered that as all litigation involves liability to costs, it belonged rather to the keeper of the purse than of the person to control the proceedings by which they would be incurred."

(*e*) *Mordaunt* v. *Moncreiffe*, L. R., 2 Sc. & Div., App. 374.

CHAPTER III.

INSANITY IN RELATION TO PARTNERSHIP (*a*).

After some difference of opinion the following propositions may be taken to be finally settled :—

Lunacy no dissolution ;

1. The lunacy of a partner does not of itself dissolve the firm (*b*) ; and, therefore, unless steps are taken for a dissolution, the lunatic partner is still entitled to share the profits (*c*), and liable for the losses, of the firm (*d*).

but may be ground for dissolution.

2. The confirmed lunacy of an active partner is sufficient to induce the High Court to decree a dissolution at the suit of the other partner or partners (*e*).

So the court may dissolve a partnership at the suit of the lunatic.

3. The High Court will dissolve a partnership at the suit of a lunatic partner, whether he has been found so by inquisition or not (*f*). Where the lunatic has been so found by inquisition, the committee of his estate, under the direction of the judge in lunacy, would be joined (*g*). Where the lunatic has not been so found, he may, but it does not follow that he will, obtain a final decree without

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(*a*) See, generally, Lindley on Partnership, ed. 5, pp. 577, 580.

(*b*) *Sayer* v. *Bennet*, 1 Cox, 107 ; *Wrexham* v. *Hudlestone*, 1 Swanst. 514, n. ; *Kirby* v. *Carr*, 3 Y. & C. 185 ; *Jones* v. *Noy*, 2 Myl. & K. 125 ; *Sadler* v. *Lee*, 6 Beav. 324 ; *Milne* v. *Bartlet*, 3 Jur. 358 ; *Leaf* v. *Coles*, 1 De G., M. & G. 171 ; *Anon.*, 2 K. & J. 441 ; cf. *Waters* v. *Taylor*, 2 V. & B. 303 ; *Jones* v. *Lloyd*, L. R., 18 Eq. 265 ; *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*c*) See the cases cited in the last note.

(*d*) *Sadler* v. *Lee*, *ubi sup.* ; *Wrexham* v. *Hudlestone*, *ubi sup.*

(*e*) *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 30 Beav. 302 ; *Sayer* v. *Bennet*, *Kirby* v. *Carr*, *Milne* v. *Bartlet*, *Leaf* v. *Coles*, *Waters* v. *Taylor*, all *ubi sup.*, n. (*b*) ; *Anon.*, 2 K. & J. 441.

(*f*) *Sadler* v. *Lee*, 6 Beav. 324 ; *Jones* v. *Lloyd*, L. R., 18 Eq. 266, 276 ; and see *Beall* v. *Smith*, L. R., 9 Ch. 85, 92, as to the case of a lunatic partner being so found during the winding up ; and see 53 & 54 Vict. c. 39, s. 35 (a).

(*g*) *Beall* v. *Smith*, *ubi sup.*

an application to the jurisdiction in lunacy (*h*). Of course his next friend is subject to the ordinary risks of next friends, and may have his proceedings wholly repudiated by the lunatic if he should recover his reason, or by the court, if the lunatic should be so found by inquisition (*i*).

Evidence.

In order to induce the court to decree a dissolution on the ground of insanity of one of the partners, the court must be satisfied, by clear evidence, that the insanity exists at the present time, and is probably incurable (*k*); proof of insanity in the past, or of a temporary illness, is not sufficient (*l*); therefore, before making a final decree, an inquiry may be directed, whether the alleged lunatic is in such a state of mind as not to be able to conduct the business of the firm in partnership with the other members according to the articles of partnership. No such inquiry is necessary where the partner is a lunatic so found by inquisition (*m*).

Partnerships may be dissolved in the ordinary way notwithstanding insanity.

The existence of lunacy does not prevent the dissolution of the partnership on any of the grounds provided by the articles, or which would operate to dissolve it, were all the partners in their senses (*n*). Articles of partnership commonly contain provisions for dissolution upon certain notice given, and a partnership at will is, under all circumstances, dissoluble upon notice. Such notice may be validly given, and may be acted upon, although one of the partners may have become insane, "for the partner serving the notice is not bound to find understanding for him that is served" (*o*).

Notice.

(*h*) *Jones* v. *Lloyd*, *ubi sup.*; *Light* v. *Light*, 25 Beav. 248; *Fisher* v. *Melles*, cit. L. R., 18 Eq. 268.

(*i*) See, in particular, *Beall* v. *Smith*, *ubi sup.*

(*k*) *Kirby* v. *Carr*, 3 Y. & C. 184; *Sadler* v. *Lee*, 6 Beav. 324; *Anon.*, 2 K. & J. 441.

(*l*) *Pearce* v. *Chamberlain*, 2 Ves. 35; *Kirby* v. *Carr*, *ubi sup.*; *Wrexham* v. *Hudlestone*, 1 Swanst. 514, n.; and see 2 Ves. 34; *Sayer* v. *Bennet*, 1 Cox, 107; *Whitwell* v. *Arthur*, 34 Beav. 140.

(*m*) *Milne* v. *Bartlet*, 3 Jur. 358; but see *Patey* v. *Patey*, 5 L. J., N. S., Ch. 198, and 2 Ves. 35.

(*n*) *Robertson* v. *Lockie*, 15 Sim. 285; *Mellersh* v. *Keen*, 27 Beav. 236; *Jones* v. *Lloyd*, L. R., 18 Eq. 265.

(*o*) *Robertson* v. *Lockie*, *ubi sup.*, per Shadwell, V.-C.

Where, however, the notice has been once served, it is not competent for the person serving it upon a lunatic partner to withdraw it; he cannot, without the consent of the other party, which, as a lunatic, he is incapable of giving, say he will become a partner again (*p*).

Committee may concur in winding up.

Where the partnership is so dissolved, the committee of a lunatic so found may, under the direction of the judge, join and concur in winding up the partnership (*q*).

Date from which dissolution decreed.

The date from which dissolution will be decreed is as follows:—

(a.) If the articles of partnership authorize a dissolution, and the partnership has been dissolved under the articles, the dissolution must date from the time at which the partnership was so dissolved, and not from the date of the decree (*r*).

(b.) Where a partnership is at will, and notice to dissolve has been given, the dissolution will be decreed as from the time fixed by the notice (*s*).

(c.) In all other cases the dissolution will be from the date of the decree (*t*).

Costs.

When the court dissolves a partnership on the grounds of insanity, it directs the costs to be paid out of the partnership assets (*u*).

Dissolution under the L. Act, 1890.

By the L. Act, 1890, a simple method, where a partner has become lunatic has been provided, though, apparently, it is applicable only when the dissolution takes place upon friendly terms, and there is no question of disputed accounts. By this the judge may, by order, dissolve the partnership, and, upon such dissolution, the committee of the estate or such other person as the judge approves may, under the

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(*p*) *Jones* v. *Lloyd*, *ubi sup.*

(*q*) 53 Vict. c. 5, ss. 119, 124.

(*r*) *Robertson* v. *Lockie*, 15 Sim. 285; *Bagshaw* v. *Parker*, 10 Beav. 532.

(*s*) *Mellersh* v. *Keen*, 27 Beav. 236. And see form of decree, ib.; and cf. *Kirby* v. *Carr*, 3 Y. & C. 184; et *ubi sup.*, p. 276, n. (*b*); *Shepherd* v. *Allen*, 33 Beav. 577.

(*t*) *Besch* v. *Frolich*, 1 Ph. 172; *Sander* v. *Sander*, 2 Coll. 276; *Jones* v. *Welch*, 1 K. & J. 765.

(*u*) *Jones* v. *Welch*, *ubi sup.*

direction of the judge, join and concur in winding up the partnership (*x*).

Recovery of a lunatic partner.

On the recovery of a lunatic partner, where no decree of dissolution of partnership has been pronounced, he is entitled to resume his share of the partnership business and direction. Where the other partners resist, an injunction will be granted upon action instituted by him, restraining them from preventing him from transacting the business as a partner, and the court will so restore the plaintiff to his proper position in the firm (*y*).

Service of writ.

Where one only of several members of a partnership firm is a lunatic, service of a writ of summons at the principal place of business is sufficient, but this would not be the case where the lunatic has no partners but is merely carrying on business under a firm name (*z*).

(*x*) 53 Vict. c. 5, ss. 119, 124, for a form of order made before the L. R. Act, 1853, see *Re Nunn*, cit. ap. Shelf. Lun. pp. 570, 571.

(*y*) *Anon.*, 2 K. & J. 441.

(*z*) R. S. C. 1883, Ord. IX. rr. 5, 6, 7; *Fore Street Warehouse Company* v. *Durrant*, 10 Q. B. D. 471.

CHAPTER IV.

THE LUNATIC AS A TRUSTEE, OR AS OTHERWISE SEISED OR POSSESSED OF PROPERTY SUBJECT TO EQUITIES.

Incapacity of lunatic.

A PERSON of unsound mind cannot execute a trust; he cannot exercise a power of appointing another to execute a trust in his room; he cannot vest property which he holds as trustee in another, that the trust may be executed: even where the trust is executed, he cannot divest himself of the bare estate, for the severance of which from the beneficial enjoyment there is no further occasion.

Attempts to remedy inconvenience.

These inconveniences were once the inevitable penalty of the convenience of trusts and mortgages. As early as the reign of George II., however, some legislative attempt was made to remove them (*a*). The remedy was developed under George IV. (*b*); and the Act of 1 Will. IV. carried the improvement still further (*c*). It is needless to refer to the details of these statutes, for the law which superseded them is of more than thirty years' date, and they command no independent interest. Such decisions upon their terms as are still of importance will be referred to in connection with the similar provisions in the statutes now in operation.

Trustee Acts.

The difficulties due to the incapacity of trustees and persons seised or possessed of property subject to equities

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(*a*) 4 Geo. 2, c. 10; cf. for Ireland, 5 Geo. 2, c. 8; under 4 Geo. 2, c. 10, a trustee found lunatic on the master's report only could not have been ordered to convey without the issue of a commission. *Ex parte Gillam*, 2 Ves. jun. 587; and cf. *Ex parte Annandale*, Amb. 80; *Ex parte Lewis*, 1 Ves. sen. 298.

(*b*) 1 & 2 Geo. 4, c. 114; 6 Geo. 4, c. 74; 7 Geo. 4, c. 43.

(*c*) 11 Geo. 4 & 1 Will. 4, c. 60.

have been remedied or provided against by the Trustee Acts, 1850 and 1852 (*d*) (substantially re-enacted in the Lunacy Act, 1890 (*e*)), and by The Conveyancing and Law of Property Act, 1881 (*f*). Of these, the Trustee Acts, 1850 and 1852, the material sections of which have been embodied in the Lunacy Act, 1890, require the most particular attention. These sections, directed to consolidate and amend the laws relating to the transfer of real and personal property vested in trustees and mortgagees, enable the proper court to divest the insane person of the property, to vest it in another, and to appoint a new trustee in the place of an insane trustee. It will be convenient to consider in detail—

L. Act, 1890.

Conveyancing Act.

Trustee Acts.

1. What cases are within the scope of the act.
2. What powers are conferred by the act.
3. How the exercise of those powers is invoked.

It may be remarked that a strict observance of the letter of these, as of all other statutes, is desirable. Orders otherwise sought will be either refused or ineffectual (*g*). The decision of a tribunal in a matter not within its jurisdiction is a nullity (*h*).

Terms of statutes to be strictly complied with.

On the subject of this chapter generally the reader is particularly referred to the appendix where the sections of the Lunacy Act, dealt with in this chapter, are set out in full.

(*d*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; the principal sections of these acts relating to the subject-matter of this chapter, have been repealed and re-enacted by the Act of 53 Vict. c. 5, ss. 135, 136, 137, 138, 139, 140, 141, 142, 143, App., post.

(*e*) 53 Vict. c. 5, ss. 128, 129; *In re Blake*, W. N. 1887, p. 173.

(*f*) 44 & 45 Vict. c. 41.

(*g*) *Re Janoway*, 7 Price, 690.

(*h*) *Att.-Gen.* v. *Hotham*, 3 Russ. 415; *Re Fitzgerald*, 1 Ll. & G. 20. A limited provision against invalidity, which, however, is only applicable to dealings with land, is made by 53 Vict. c. 5, s. 140, in regard to proceedings under that act; and that section provides for mulcting the erring party in costs.

1. *What Cases are within the Scope of the Trustee Acts and the sections of the Lunacy Act relating to Trustees.*

Cases within the acts.

The sections deal with persons seised or entitled upon any trust or by way of mortgage.

"Trust."

"Trust" extends to and includes implied or constructive trusts; cases in which the trustee has, as well as those in which he has not, any beneficial interest or estate in the subject of the trust, and the duties incident to the office of personal representative. Of all relations within this wide limitation, it only does not mean the duties incident to an estate conveyed by way of mortgage (*i*).

Who are trustees.

The husband of a female trustee, so far as his direction or co-operation is required (*k*), and an heir who takes by descent, but has bound himself on the doctrine of election to hold upon the trusts of the will (*l*), are within the terms of the act.

Vendor before completion.

So also are, generally speaking, a vendor before completion (*m*) and an equitable mortgagor (*n*); but some question has arisen as to how far it is necessary that the constructive trust should have been previously declared by a decree of the court.

Practice where contract not disputed.

Where the contract is not disputed, it seems that a previous decree is unnecessary, if the alleged trustee is the original vendor (*o*) or his devisee (*p*); on the other hand, where the alleged trustee is the heir of the vendor, a previous decree is required (*q*), unless the contract is an exe-

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(*i*) 53 Vict. c. 5, s. 341.

(*k*) *Re Wood*, 3 De G., F. & J. 125. It appears that the committee of the lunatic is properly served in this case, and his costs will be allowed. Cf. also *Ex parte Bradshaw*, 2 De G., M. & G. 900; see also Morgan's Chancery Acts and Orders, p. 64, ed. 6, for persons who have been held to be trustees within the Trustee Acts.

(*l*) *Dewar* v. *Maitland*, L. R., 2 Eq. 834.

(*m*) *Re Angelo*, 5 De G. & S. 278; and the cases cited in notes (*p*), (*q*), (*r*), and *Re Wilson*, 58 L. T., N. S., 509.

(*n*) *Re Rogers*, 13 L. J., N. S., Ch. 262.

(*o*) *Re Angelo, ubi sup.*

(*p*) *Re Taylor*, 1 W. N. 15.

(*q*) *Re Dickinson*, 17 L. T. 113; *Jackson* v. *Milfield*, 5 Ha. 538; *Re Milfield*, 2 Phill. 254; *Re Burt*, 9

cuted contract (*r*), *e.g.*, where there has been a covenant to surrender copyholds, or unless the contract is a compulsory sale in pursuance of statutory powers (*s*).

Where contract disputed.

Where the contract is disputed, it is presumed that a decree would be necessary (*t*); and the court may, in any case, postpone its order that an action may be commenced (*u*).

If a *cestui que trust* has sold his equitable interest and the sale has been completed, the original trustee is then a trustee for the purchaser (*x*).

Trustees in bankruptcy, &c.

Trustees and assignees in bankruptcy (*y*), trustees of creditors' deeds (*z*), and trustees with an office, but without an estate (*a*), are included in the act.

Party declared a trustee by decree.

Finally, where a decree has been made for the specific performance of a contract concerning land, or for the partition or exchange of land, or for the conveyance or assignment of land, the court may declare any of the parties to the action to be a trustee of the land or any part thereof, within the meaning of the act (*b*).

Where an action is necessary as ground for a vesting order no costs will be given on either side (*c*).

"Mortgage."

"Mortgage" includes every estate, interest or property

Ha. 289; *Re Weeding's Estates*, 4 Jur., N. S. 707; *Cust* v. *Middleton*, 7 Jur., N. S. 151; *Re Carpenter*, Kay, 418; *Re Faulder*, 1 W. N. 83; *In re Colling*, 32 Ch. D. 333.

(*r*) *Re Collingwood's Trusts*, 6 W. R. 536; *Steele* v. *Waller*, 28 Beav. 466; *Re Cuming*, L. R., 5 Ch. 72.

(*s*) *Re Russell's Estate*, 12 Jur., N. S. 224; *Re Lowry's Will*, L. R., 15 Eq. 78.

(*t*) See *Collinson* v. *Collinson*, 3 De G., M. & G. 409; *Re Burt*, 9 Ha. 289; *Re De Visme*, 9 L. T., N. S. 668.

(*u*) 13 & 14 Vict. c. 60, s. 53.

(*x*) *Re Wilkinson's Trusts*, 10 Jur., N. S. 716; *Re Groom*, 11 L. T., N. S. 336.

(*y*) *Re Joyce's Estate*, 12 Jur., N. S. 1015; cf. *Re Raphael's Trust Estate*, L. R., 9 Eq. 233.

(*z*) *Re Donisthorpe*, L. R., 10 Ch. 55; cf. *Re Price's Trust Deed*, L. R., 6 Eq. 460.

(*a*) *Re Boyce*, 10 Jur., N. S. 138.

(*b*) 13 & 14 Vict. c. 60, s. 30; and cf. *Re Bloomar*, 2 De G. & J. 88; cf. *Re Sherard*, 1 De G., J. & S. 421.

(*c*) *Cresswell* v. *Haines*, 8 Jur., N. S. 208.

in real or personal estate, which is a security for money or money's worth (*d*).

"Lunatic."

"Lunatic" means an idiot or person of unsound mind (*e*).

"Person of unsound mind."

"Person of unsound mind," a person not an infant, who, not having been found lunatic, is incapable from infirmity of mind to manage his own affairs (*f*): an imbecile is included in this category (*g*).

Where insanity contested.

Where the unsoundness of mind is contested, the case is not within the act, and the remedy must be sought by an action (*h*). "The act," said Lord Cottenham, of the similar statute, 1 Will. 4, c. 60, "is only intended to enable parties entitled to the benefit of a legal estate to obtain it from a person in whom it is vested, and who is admitted to be incompetent to convey it, and not to involve his family in a controversy, in which they have no sort of interest, as to whether he is a lunatic or not, merely for the benefit of third persons (*i*).

Still, the judge in lunacy may, when an application is made, direct an inquisition, and postpone his order until the return (*k*).

Land.

"Land" includes an undivided share of land (*l*).

Stock.

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships, registered under the Merchant Shipping Act, 1854 (*m*).

(*d*) 53 Vict. c. 5, s. 341.

(*e*) Ib. s. 341.

(*f*) 13 & 14 Vict. c. 60, s. 2; *In re Dewhirst's Trusts*, 33 Ch. D. 416; *In re Martin's Trusts*, 34 Ch. D. 618; not following *In re Phelps' Settlement Trusts*, 31 Ch. D. 351; *In re Barber*, 39 Ch. D. 187; *Re Campbell*, W. N. 1888, p. 176.

(*g*) *Re Good Intent Benefit Society*, 2 W. R. 671. And see *Re Wakeford*, 1 J. & L. 2; *Re Jones*, 6 Jur. 547; *Re Ramshay*, 15 Jur. 69.

(*h*) *Re Campbell*, 18 L. T. 202; *Re Walker*, Cr. & Ph. 147; *Re Combs*, 51 L. T., N. S. 45.

(*i*) *Re Walker*, Cr. & Ph. 149, 150.

(*k*) 13 & 14 Vict. c. 60, s. 52.

(*l*) 53 Vict. c. 5, s. 341; and 13 & 14 Vict. c. 60, s. 2.

(*m*) Ib.

For the definitions of terms used in the act, the reader is referred to section 2 of the Trustee Act, 1850, and s. 341 of the Lunacy Act, 1890.

2. *What Powers are conferred by the Lunacy Act.*

These, so far as our immediate subject is concerned, are of three kinds (*n*)—

Powers conferred by act.

(A.) The divesting a trustee or mortgagee who is lunatic or of unsound mind of property vested in him, and the vesting it in some other person.

(B.) The appointing a new trustee in the place of a trustee who is lunatic or of unsound mind.

(C.) The appointing a new trustee where a person in whom the power of appointment is vested is a lunatic or of unsound mind.

Vesting orders.

(A.) The first of these admits of six divisions, according as the property in question is land, contingent right in land, stock in the name of the lunatic, solely or jointly, or in the name of his testator or intestate, or a chose in action vested in the lunatic in his own right or in the right of his testator or intestate. In each of these several cases there is ordinarily more than one way of attaining the desired end.

"Land."

(a.) Where the property is land, the judge in lunacy may make an order,

(i.) That the land be vested in such person or persons in such manner and for such estate as he may direct (*o*); or

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(*n*) In *Re Ward*, 2 Mac. & G. 73, it was said, "It may be laid down as a general rule, that, whenever there remains any portion of the trusts of an instrument to be administered, the court invariably declines to administer the trust, it merely substitutes a trustee in the place of the lunatic." *In re Currie*, 10 Ch. D. 93; *In re Holland*, 16 Ch. D. 672.

(*o*) 53 Vict. c. 5, s. 135, sub-s. (1). As to form of order where a trustee is tenant in tail, see *Re Mason, Mason* v. *Mason*, 7 Ch. D. 707.

(ii.) Appointing a person to convey the land (*q*).

Contingent right in land.

(b.) Where the property is a contingent right in land the judge in lunacy may make an order,

(i.) Releasing the contingent right, or disposing thereof to such person or persons as he may direct (*r*); or,

(ii.) Appointing a person to release or dispose of the contingent right (*s*).

Effect of exercise of power as to (a.) (b.).

The effect of either mode of dealing with land or a contingent right in land is the same as if the trustee or mortgagee, being sane, had duly executed a conveyance or assignment of the land in the same manner and for the same estate (*t*), or had executed a deed releasing or disposing of the contingent right (*u*). Moreover, where, the land being copyhold or of customary tenure, the order is made in the former of the two modes, and with the consent of the lord or lady of the manor (which may, it seems, be given by act *in pais*, and without appearance) (*x*), no surrender or admittance is necessary (*y*). Where the order is made in either of the two ways, but without such consent, then there must be an admittance or a surrender and admittance, as the case may be, and the lord's rights not being, in fact, prejudiced by the order, the application need not so much as be served upon him (*z*).

Copyhold.

Such, at least, is the construction that has been put upon the words of the previous act. At the same time it must be admitted as doubtful whether it accords with the actual provisions, which seem to contemplate that where the consent of the lord or lady of the manor is not obtained,

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(*q*) 53 Vict. c. 5, s. 135, sub-s. (4).

(*r*) Ib. sub-s. (2).

(*s*) Ib. sub-s. (4).

(*t*) Ib. sub-s. (3); under the section a person may be appointed to convey an estate for the purpose of effectuating a transfer of a mortgage. *In re Nicholson*, 34 Ch. D. 663.

(*u*) Ib.

(*x*) *Ayles* v. *Cox*, 17 Beav. 585.

(*y*) 53 Vict. c. 5, s. 135, sub-s. (5).

(*z*) See Lewin on Trusts, p. 1025, and *Paterson* v. *Paterson*, L. R., 2 Eq. 31; *Re Flitcroft*, 1 Jur., N. S. 418; *Re Hurst*, 2 Set. Dec. 799; *Re Hey's Trusts*, 9 Ha. 221, overruling *Cooper* v. *Jones*, 2 Jur., N. S. 59; *Re Howard*, 3 W. R. 605.

the court should in every case appoint a person to convey, who would surrender in the ordinary way (*a*).

Where this order is made, the person appointed may execute and do all assurances and things for completing the assurance of the lands, and the lord and lady of the manor will, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment has been made, being free from any disability, had done and executed such assurance and things (*b*).

It is worthy of note in this connection, that when the original trustee has not been admitted, one fine only is payable on the admission of the substituted trustee (*c*).

"Stock."

(c.) (d.) Where the property is stock standing in the name of the trustee or mortgagee, or of a deceased person whose personal representative is lunatic or of unsound mind, the judge in lunacy may make an order,

(i.) Vesting in any person or persons the right to transfer or call for a transfer of the stock or to receive the dividends or income thereof (*d*); or,

(ii.) Appointing some proper person to transfer or join in transferring the stock (*e*).

Effect of exercise of power as to stock.

The effect of an order of the former kind will be that the person or persons appointed will be thereby authorized and empowered to execute all powers of attorney, assurances and things to complete the transfer to himself or themselves according to the order; and the Bank of England and all

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(*a*) 53 Vict. c. 5, s. 135, sub-s. (6).

(*b*) Ib., and cf. *Re Hey's Trusts*, 9 Ha. 221.

(*c*) *Bristow* v. *Booth*, L. R., 5 C. P. 80.

(*d*) 53 Vict. c. 5, s. 136, sub-ss. (1), (3). As to Irish property see *In re Hodgson*, 11 Ch. D. 888. In the case where the lunatic or person of unsound mind is entitled jointly with any person or persons, the right to transfer, &c. will be vested either in such person or persons alone or jointly with any other person or persons. Ib. s. 136, sub-s. (2).

(*e*) 53 Vict. c. 5, s. 136, sub-s. (4).

other companies and their officers and all other persons will be bound to obey every order according to its tenor. After notice in writing of the order it will not be lawful for the Bank, or any other company, to transfer any stock to which the order relates, or to pay the dividends thereon, except in accordance with the order (*f*).

Fund, how ordered into court.

The judge in lunacy may make declarations and give directions as to the manner in which the right to any stock vested under the act shall be exercised (*g*); but though it can direct trustees to transfer into court under the Trustee Relief Act (*h*), it has no power to order the fund into court immediately (*i*).

It should be added, that where it is desired that stock standing in the name of a lunatic or person of unsound mind, or in the name of his testator or intestate, should be brought into court, the application to the judge in lunacy should not be made until the same has been heard by the judge to whose court the cause is attached (*k*).

"Chose in action."

(e.) (f.) Where the property is a chose in action vested in a trustee or mortgagee, or a personal representative, who is lunatic or of unsound mind, the judge in lunacy may make an order vesting in any person or persons the right to sue for the chose in action (*l*).

Jurisdiction to make the order.

In regard to the various powers hitherto treated of, the judge in lunacy alone has in ordinary cases jurisdiction to make the orders required (*m*). A special jurisdiction is given to the High Court of Justice to make similar orders in certain cases. These are—

(i.) When a decree has been made by any court directing

(*f*) 53 Vict. c. 5, s. 136, sub-ss. (5), (6).

(*g*) Ib. s. 139.

(*h*) *Re Thornton's Trusts*, 9 W. R. 475.

(*i*) *Re Parby*, 29 L. T. 72.

(*k*) *Re Dawson*, 6 N. R. 346.

(*l*) 53 Vict. c. 5, s. 136, sub-ss. (1), (2), (3).

(*m*) Vide post, pp. 294, *et seq.* As to land in Ireland vested in a lunatic trustee, see *Re Lamotte*, 4 Ch. D. 325, where the court would seem to have trespassed on the jurisdiction of the Irish chancellor, 53 Vict. c. 5, s. 110; see, too, *Re Davies*, 3 Mac. & G. 278; *In re Smyth*, 34 W. R. 493, and post, p. 295.

the sale of any lands for any purpose whatever (*n*);

(ii.) The case of applications at chambers on behalf of charities the income of which exceeds 30*l.* per annum, when any judge is empowered to make the ordinary order notwithstanding a lunacy (*o*);

(iii.) Where the trustee or mortgagee, though lunatic or of unsound mind, is an infant, the case is within the jurisdiction of the High Court (*p*).

Appointment of new trustee in place of a lunatic.

(B.) The next power for consideration is that of appointing a new trustee in the place of a trustee who is lunatic or of unsound mind.

In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees (*q*).

Observations on the terms of the power.

From the ambiguous wording of the tenth section in the Act of 1852 (*r*), a question arose as to its extent. It was doubted whether it extended to a case in which the trustee had no estate, and where, therefore, the court was not required to order a conveyance or transfer. In one case, Lord Westbury, C., seems to have thought it did not, and, there being no doubt as to the power of the Court of Chancery to make the order in the case of a trustee of a bare power, he made it by virtue of his original jurisdiction in that court, and directed the order to be drawn up in chancery as well as in lunacy (*s*).

(*n*) 15 & 16 Vict. c. 55, s. 10; cf. *Harrison* v. *Smith*, 17 W. R. 646; *Herring* v. *Clark*, L. R., 4 Ch. 167; *Re Stamper*, 46 L. T., N. S. 372.

(*o*) 16 & 17 Vict. c. 137, s. 28; cf. *Re Davenport's Charity*, 4 De G., M. & G. 839; and 53 Vict. c. 5, s. 138.

(*p*) 53 Vict. c. 5, s. 143, and *Re Arrowsmith's Trusts*, 4 Jur., N. S. 1123; *In re Edwards*, 10 Ch. D. 605.

(*q*) 53 Vict. c. 5, s. 141.

(*r*) 15 & 16 Vict. c. 55, s. 10, where the words were added "in like manner as the Court of Chancery may do in like cases," that was to say under s. 32 and the following sections of the Trustee Act, 1850.

(*s*) *Re Boyce*, 10 Jur., N. S. 138; cf. *Re Porter's Will*, 3 W. R. 583;

In a subsequent case, Lord Justice Giffard said he did not see there was any doubt in the matter; but the report does not show how far the features of that case agree with those of the case before Lord Westbury (*t*).

It is true that, on a comparison of the use of the word "also" in a section of the Trustee Act, 1850 (sect. 28), it might be argued that the word is not to be construed too strictly, (since there it almost amounts to "in lieu of,") but rather that it introduces an additional power independent of the powers previously referred to.

On the other hand, if the general structure of the acts is considered, it appears rather that this power of appointing new trustees was conferred as an afterthought on the lord chancellor in lunacy, with the object of avoiding an application to two courts, where, by virtue of the exclusive jurisdiction of the lord chancellor to vest the estate, application for that purpose must in any case be made to him (*u*).

However, the courts, at least in *dicta*, seem to have gone even beyond the decision that the judge in lunacy has jurisdiction to appoint a new trustee in the place of one lunatic or of unsound mind, and have ruled that he has the sole jurisdiction in such a case (*x*). It is submitted, on a fair construction of the acts, that but for the declarations of the courts the High Court would have had at least a concurrent jurisdiction to make the appointment (*y*), though

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where, however, the solution of making the order in chancery does not seem to have occurred to the court.

(*t*) *Re Owen*, L. R., 4 Ch. 782.

(*u*) This view is confirmed if a further comparison is made with s. 22 of 11 Geo. 4 & 1 Will. 4, c. 60, which contains no power of appointing new trustees independently of a petition for a vesting order.

(*x*) See, in particular, *Re Good Intent Benefit Building Society*, 2 W. R. 671; *Re Ormerod*, 3 De G. & J. 249. In the latter case the *dicta* were quite beside the mark, for a vesting order was prayed; nor does it avail to cite cases under 11 Geo. 4 & 1 Will. 4, c. 60, for the reason stated in n. (*u*).

(*y*) See 13 & 14 Vict. c. 60, s. 32; and cf. *Re Boyce, Re Porter's Will*, n. (*s*), *supra*. And so it has been held by Hall, V.-C., in *Re*

the judge in lunacy has the sole jurisdiction to make a vesting order when such an order is needed.

Appointment of trustees in place of lunatic, and of other trustees.

A further question arises as to jurisdiction where it is desired to appoint trustees in place, not merely of one who is lunatic or of unsound mind, but of one or more besides. The whole question will be considered hereafter (*z*).

Power of appointment when exerciseable.

The power of appointment is exerciseable whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court (*a*). It may be exercised, moreover, at least where the vacancy is occasioned by lunacy or unsoundness of mind, although there may be a power of appointing a new trustee in such an event contained in the deed or will creating the trust (*b*). The omission of such a power was, however, the most fertile cause of application to the court. This omission was as to deeds and wills, since the 28th August, 1860, to a great degree remedied by Lord Cranworth's Act, which has since been superseded by the Conveyancing Act, 1881 (*c*).

Lord Cranworth's Act.

The Conveyancing Act, 1881.

By the 31st section of the latter act, where a trustee becomes incapable to act in the trusts reposed in or conferred on him (now a lunatic or person of unsound mind is so incapable) (*d*), and no person is nominated by the instrument creating the trust for the purposes of appointing new trustees, or if there is no such person able or willing to act, then "the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing,

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Vickers' Trusts, L. R., 3 Ch. D. 112. These questions seem now to be in great measure set at rest by the Lunacy Act, 1890.

(*z*) Vide post, pp. 294 *et seq.*

(*a*) 13 & 14 Vict. c. 60, s. 32; and see Lewin on Trusts, pp. 853.

(*b*) *Re Davies*, 3 Mac. & G. 278; *Re Cooper's Settlement*, 25 L. J., N. S., Ch. 685.

(*c*) 23 & 24 Vict. c. 145; 44 & 45 Vict. c. 41.

(*d*) *Re East*, L. R., 8 Ch. 735; *In re Chell*, 31 W. R. 898.

appoint another person or other persons to be a trustee or trustees in the place of the trustee or trustees (among other things) being incapable as aforesaid." On an appointment the number of the trustees may be increased, and it is not obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number, where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, a trustee is not discharged unless there remain at least two trustees to perform the trust. On an appointment, any assurance or thing requisite for vesting the trust property jointly in the persons who are trustees shall be executed and done. And every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in him, shall have the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust (*e*).

Practice under sect. 32 of the Trustee Act.

When, notwithstanding the provisions of the act, it still becomes necessary to apply to the court, the order may be made for appointing new trustees or a new trustee either in substitution for or in addition to any existing trustee or trustees (*f*), nor need the original number of trustees be preserved. Thus, the court has appointed two trustees instead of one (*g*), and has added two new trustees to the two original trustees (*h*), but it never appoints a single trustee where there were originally more trustees than one (*i*). Where there was but one trustee originally and the trust was coming to an end, the court once appointed a single trustee (*k*). And where there have been originally

(*e*) 44 & 45 Vict. c. 41, s. 31.

(*f*) 13 & 14 Vict. c. 60, s. 32.

(*g*) *Re Tunstall's Will*, 4 De G. & S. 421.

(*h*) *Re Boycott*, 5 W. R. 15.

(*i*) *Re Ellison's Trusts*, 2 Jur., N. S. 62; *Re Porter's Trusts*, ibid. 349; *Re Tunstall*, *ubi sup.* n. (*g*); *Re Dickinson's Trusts*, 1 Jur., N. S. 724.

(*k*) *Re Reynault*, 16 Jur. 233.

several trustees, a less number have sometimes been appointed; thus, three instead of four (*l*); and two instead of three (*m*); the continuing trustees will be appointed to act alone where the trust has come to an end and the fund is immediately divisible, but not otherwise (*n*). Trustees will be appointed after the death of a lunatic for the purpose of getting rid of funds standing to the credit of the lunacy (*o*).

The court, moreover, will not appoint persons trustees who are resident out of the jurisdiction (*p*); nor if it can be avoided will it appoint one of the *cestuis que trustent* (*q*). An unmarried lady, notwithstanding the usual objection to female trustees, has been appointed when difficulty was experienced in finding any other suitable person (*r*).

Effect of an appointment under the acts.

The new trustee or trustees on appointment will have all the same rights and powers as he or they would have had if appointed by decree in an action duly instituted (*s*); or, where appointed under the Conveyancing Act, 1881, as if he or they had been originally nominated as trustee or trustees by the deed, will, or other instrument creating the trust (*t*).

But the appointment by the court, and any conveyance, assignment or transfer in pursuance thereof, operates no further or otherwise as a discharge to any former or con-

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(*l*) *Bulkeley* v. *Eglinton*, 1 Jur., N. S. 994.

(*m*) *Emmet* v. *Clarke*, 7 Jur., N. S. 404; *Re Bergholt*, 2 Eq. Rep. 90.

(*n*) *Re Stokes' Trust*, L. R., 13 Eq. 333; *In re Harford's Trusts*, 13 Ch. D. 135; *In re Colyer*, 50 L. T., N. S., Ch. 79. *In re Aston*, 23 Ch. D. 217; *In re Martyn*, 26 Ch. D. 745.

(*o*) *In re Orde*, 24 Ch. D. 271; 15 & 16 Vict. c. 55, s. 9.

(*p*) *Re Guibert*, 16 Jur. 852.

(*q*) *Ex parte Clutton*, 17 Jur. 988; *Re Clissold*, 10 L. T., N. S. 642; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Re Giraud*, 32 Beav. 385.

(*r*) *Re Berkley*, L. R., 9 Ch. 720.

(*s*) 13 & 14 Vict. c. 60, s. 33.

(*t*) 44 & 45 Vict. c. 41, s. 31, sub-s. 5.

tinuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done (*u*).

Appointment of new trustees where power in a lunatic.

(C.) The third kind of power on the list is that of appointing a new trustee, where a person in whom the power of appointment is vested is a lunatic or person of unsound mind.

This is evidently a case in which, according to the words of the 32nd section of the Trustee Act, 1850, it is "inexpedient, difficult or impracticable," to appoint without the assistance of the court.

Accordingly, in such a case the High Court has jurisdiction to appoint a new trustee or new trustees to fill the existing vacancy, and to vest in him or them, where necessary, the property subject to the trust (*x*).

As to the number and quality of the persons to be appointed, the reader is referred to the preceding pages of this Chapter, where these points have been already considered (*y*).

The difficulty of lunacy in the donee of a power where the lunatic has been so found by inquisition is further met by the provisions of the Lunacy Act, 1890 (*z*), for which the reader is referred to a subsequent section on the lunatic as donee of a power (*a*).

3. *How is the exercise of the Powers of the Lunacy Act, which have been already detailed, invoked?*

Procedure to obtain relief under Lunacy Act.

Court having jurisdiction.

This is by petition or summons to the court having jurisdiction to make the order which will be entitled in the matter of the trust or mortgage and in the matter of the

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(*u*) 13 & 14 Vict. c. 60, s. 36.

(*x*) 13 & 14 Vict. c. 60, ss. 32 *et seq.*

(*y*) Ante, pp. 292, 293.

(*z*) 53 Vict. c. 5, s. 128; *In re Lord Kilworth*, I. R., 11 Eq. 612; *In re Blake*, W. N. 1887, p. 173.

(*a*) Post, p. 305.

Lunacy Act, 1890 (*b*). Some allusion has been unavoidably made on an earlier page to the difficulty that occasionally arises in this respect (*c*). The result of the considerations there dealt with is, that, in the author's opinion, it is the fact of there being a legal estate in a lunatic or person of unsound mind (*d*) which attracts the jurisdiction in lunacy: but that in some cases doubt had been thrown on this principle by the court. This principle, however, seems to have been practically adopted in the class of cases to which attention is now to be drawn, that, namely, in which it has been desired to fill vacancies occasioned not only by the lunacy or unsoundness of mind of a trustee, but by the death, disclaimer, residence abroad, refusal or neglect to act, or other act, default or circumstance of one or more of his co-trustees. In these cases where the legal estate is vested in the lunatic, either solely or jointly with continuing trustees only, the jurisdiction in lunacy is sufficient, where it is vested also in a co-trustee or co-trustees, whose vacancy or vacancies require to be supplied, the jurisdiction of the High Court must be invoked in aid (*e*). The Court in acting under the Trustee Acts never administers trusts, but only appoints new trustees when requisite and then makes the necessary vesting order (*f*).

Rules determining the jurisdiction to make orders under the Lunacy Act.

1. Accordingly, it would appear that where a vesting order and appointment of a new trustee or new trustees, or a vesting order alone is sought, and the legal estate is vested either in the lunatic alone, as where he is a sole trustee, or a sole surviving trustee, or the only trustee who has not duly and effectually disclaimed, or in the lunatic jointly with

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(*b*) R. L. 1890, 56.

(*c*) Ante, pp. 288 *et seq.*

(*d*) In cases of incapacity arising from old age and general decay of faculties, the High Court has jurisdiction under s. 32 of the Trustee Act, 1850; *In re Lemann's Trusts*, 22 Ch. D. 633; *In re Barber*, 29 Ch. D. 187.

(*e*) *In re Vicat*, 33 Ch. D. 103; *In re Pearson*, 5 Ch. D. 982; *In re Chell*, 31 W. R. 898.

(*f*) *In re Currie*, 10 Ch. D. 93.

Rules determining the jurisdiction to make orders under the Lunacy Act.

continuing trustees only for any of the like reasons, then the application for the vesting order and appointment of new trustees, or for the vesting order alone, should be entitled in lunacy only (*g*).

2. Where the legal estate is vested in the lunatic, and in other trustees who have gone to reside abroad, refuse to act, desire to retire, or, for some other purpose, require to have vacancies created by them supplied, then the application should be entitled in the High Court as well as in lunacy (*h*). Where a lunatic trustee is out of the jurisdiction, the High Court has sole jurisdiction, as in the case of any other trustee out of the jurisdiction (*i*).

3. Where the appointment of a new trustee or new trustees is sought, without a vesting order being also required, and one vacancy at least is occasioned by the lunacy or unsoundness of mind of a trustee, then if that vacancy alone, or that vacancy and a vacancy or vacancies arising from the death or disclaimer of a co-trustee or co-trustees is required to be supplied, the application may, according to Lord Justice Giffard, be entitled in lunacy only (*k*), and cannot be made in the High Court (*l*); but, according to the Lord Chancellor Westbury, should be entitled in lunacy and the High Court (*m*); and, in the author's humble opinion, may and should be entitled in the High Court only (*n*).

(*g*) *Re Ormerod*, 3 De G. & J. 249; *Jeffryes* v. *Drysdale*, 7 Jur., N. S. 667; and cf. *Re Donisthorpe*, L. R., 10 Ch. 55; *In re Nash*, 16 Ch. D. 503; *In re Watson*, 19 Ch. D. 384; *In re Ray*, 47 L. T., N. S. 500.

(*h*) *Re Stewart*, 8 W. R. 297; *Re White*, L. R., 5 Ch. 698; *Re Mason*, L. R., 10 Ch. 273; *In re Batho*, 39 Ch. D. 189.

(*i*) *In re Holland*, 16 Ch. D. 672; *In re Duces' Trusts*, 30 W. R. 759; *In re Gardner's Trusts*, 10 Ch. D. 29.

(*k*) *Re Owen*, L. R., 4 Ch. 782; *Re Good Intent Benefit Society*, 2 W. R. 671; *In re Rolls-Hoare*, W. N. 1888, p. 94.

(*l*) *Re Good Intent Benefit Society*, 2 W. R. 671.

(*m*) *Re Boyce*, 10 Jur., N. S. 138.

(*n*) The jurisdiction of the High Court has since been affirmed; *Re Vickers' Trusts*, 3 Ch. D. 112; and cf. *Re Porter's Will*, 3 W. R. 583.

Rules determining the jurisdiction to make orders under the Lunacy Act.

4. Where the appointment of new trustees is sought, in the place of a lunatic and of other trustees who have occasioned vacancies for other reasons than death or disclaimer, and no vesting order is required, then it would seem that by analogy, the petition should be entitled in lunacy and the High Court, though, as before, the author cannot but think that the High Court alone has jurisdiction to make the order.

It should be observed, that where the assistance of the jurisdiction of the High Court is required in addition to that in lunacy, if the persons for the time being comprised in the description "the judge in lunacy" have original jurisdiction in the High Court, they will make the order without sending the applicants to a division of the court (*o*).

The following table will perhaps simplify the application of the rules, derived from decided cases or *dicta*:—

Vesting order and new appointment; or vesting order alone.	
Where in respect of lunatic or person of unsound mind alone.	Lunacy only (*p*).
Where in respect of lunatic or person of unsound mind and a trustee or trustees who has or have died or disclaimed.	Lunacy only (*q*).
Where in respect of lunatic or person of unsound mind and a trustee or trustees who has or have neither died nor disclaimed.	Lunacy and High Court (*r*).

(*o*) *Re Stewart*, 8 W. R. 297; *Re Chauncey*, 14 W. R. 849.

(*p*) *Jeffryes* v. *Drysdale*, 7 Jur., N. S. 667; *Re Watson*, 19 Ch. D. 384; *Re Ray*, 47 L. T., N. S. 500; *Re Watson*, 58 L. T., N. S. 509.

(*q*) *Re Ormerod*, 3 De G. & J. 249.

(*r*) *Re Stewart*, 8 W. R. 297; *Re White*, L. R., 5 Ch. 698; *Re Pearson*, 5 Ch. D. 982; *In re Currie*, 10 Ch. D. 93; *Re Mason*, L. R., 10 Ch. 273; *Re Wacher*, 22 Ch. D. 535; *In re Batho*, 39 Ch. D. 189; *Re Chell*, 31 W. R. 898; *In re Gardiner's Trusts*, 10 Ch. D. 29.

Rules determining the jurisdiction to make orders under the Lunacy Act.

Appointment of new trustee or trustees without vesting order.	
Where in place of lunatic or person of unsound mind alone.	Lunacy only (*s*). Lunacy and High Court (*t*).
Where in place of lunatic or person of unsound mind and a trustee or trustees who has or have died or disclaimed.	Lunacy only (*u*).
Where in place of lunatic or person of unsound mind and a trustee or trustees who has or have neither died nor disclaimed.	Lunacy and High Court (*x*).
In each and every of the above cases.	High Court alone (*y*).

5. Where the application is made on account of the lunacy or unsoundness of mind of a mortgagee, or a vesting order alone is sought, the application must clearly be in lunacy only.

6. Where on account of the incapacity of the donee of the power, in the High Court only (*z*).

Practice.

Who may apply; in case of a trust;

The application, where the subject-matter is a trust, may be made by any person beneficially interested in the property, subject to the trust, whether under disability or not, or by any person duly appointed a trustee thereof (*a*).

A purchaser beneficially entitled to property sold under the direction of the court (*b*), and the plaintiffs in an

(*s*) *Re Owen*, L. R., 4 Ch. 782; *Re Good Intent Benefit Society*, 2 W. R. 671; *In re Rolls-Hoare*, W. N. 1888, p. 94.

(*t*) *Re Boyce*, 10 Jur., N. S. 138.

(*u*) *Re Owen, ubi sup.*; *In re Rolls-Hoare*, supra.

(*x*) *Re Stewart*, 8 W. R. 297.

(*y*) *Re Vickers' Trusts*, 3 Ch. D. 112.

(*z*) *Re Parker's Trusts*, 32 Beav. 580; *Re Sparrow's Trusts*, 18 W. R. 1065, 1185; *Re John Heaphy's Trusts*, 18 W. R. 1070.

(*a*) R. L. 1890, 55 (*a*).

(*b*) *Ayles* v. *Cox*, 17 Beav. 584; *Rowley* v. *Adams*, 14 Beav. 130.

administration suit (*c*), are within the provision. So, too, is a person contingently entitled to a beneficial interest (*d*).

But the committee of a lunatic *cestui que trust* is not entitled to apply, at least on his own account (*e*). It is submitted, however, that he is at liberty to do so in the name and on behalf of his *cestui que trust*; the committee of a lunatic trustee may certainly do so (*f*).

in case of a mortgage.

Where the intervention of the court is sought in respect of any property subject to a mortgage, the application may be made by any person beneficially interested in the equity of redemption whether under disability or not, or by any person interested in the mortgage moneys (*g*).

But if it is the mortgagee himself who is lunatic, and a committee of his estate has been appointed, it seems that the mortgagor when desirous to redeem should apply to the committee, who is the proper person to apply to the court (*h*). On the default of the committee to act, the mortgagor may clearly act himself (*i*). The Lunacy Court has jurisdiction to direct the committee to transfer a mortgage where the mortgagee is a lunatic (*k*).

Transfer of mortgage.

Evidence in support.

The application must be supported by evidence, which may be by affidavit or otherwise (*l*); in practice, it is universally by affidavit.

Where the application is for the appointment of a trustee or trustees, the evidence must include affidavits of the fitness of the proposed trustee or trustees and proof of his or their consent to act (*m*). The occupation of the person making the affidavit of fitness must be described (*n*).

(*c*) *Re Wragg*, 1 De G., J. & S. 356.

(*d*) *Re Sheppard's Trusts*, 1 N. R. 76.

(*e*) *Re Bourke*, 2 De G., J. & S. 426.

(*f*) *Re Wheeler*, 1 De G., M. & G. 434.

(*g*) R. L. 1890, 55 (*b*).

(*h*) *Re Wheeler*, 1 De G., M. & G. 436; *Re Thomas' Trusts*, 15 Jur. 187; *Re Biddle*, 23 L. J., N. S., Ch. 23; *Re Stuart*, 4 De G. & J. 319.

(*i*) R. L. 1890, 55 (*b*); 13 & 14 Vict. c. 60, s. 40.

(*k*) *In re Peel*, 35 W. R. 81.

(*l*) Lewin on Trusts, 1033.

(*m*) *Battersby's Trusts*, 16 Jur. 900; and see *Grundy* v. *Buckeridge*, 22 L. J., N. S., Ch. 1107; R. L. 1890, 91, 92.

(*n*) *In re Orde*, 24 Ch. D. 271; where Cotton, L.J., said that it was

Verification of new trustee's consent to act.

The signature of a new trustee to his consent to act had in lunacy to be verified by affidavit according to the old practice (*o*), but if the proceedings were in chancery as well as in lunacy (and now in all cases) a written consent signed by him and verified by the signature of his solicitor was sufficient (*p*).

Besides the special evidence required for the appointment of a new trustee, there must in every case, when a petition is presented, be evidence of the facts alleged in the petition (*q*). But evidence filed in a cause has been allowed to be used in a petition in the same matter (*r*); and the devolution of the beneficial title may be traced by affidavits without strict evidence by certificates and affidavits of identity (*s*).

Where the evidence is satisfactory, the court will make the order without a reference (*t*).

Service of application.

Applications for the appointment of new trustees in the place of subsisting trustees, or for a vesting order where the legal estate is in subsisting trustees, must generally be served on these trustees (*u*). If the trustee is a lunatic so found, the committee of the estate must be served, as he may have some claim on the estate for costs or otherwise (*x*). Where, on the other hand, the trustee is a person of unsound mind not found lunatic, he need not be served either where a vesting order alone is sought (*y*), or where a vesting order and appointment of a new trustee are sought together (*z*). *A fortiori*, he need not be served where an appointment of a new trustee is alone sought.

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not sufficient to describe the person making the affidavit of fitness merely as a "gentleman."

(*o*) *In re Wilson*, 31 Ch. D. 522.

(*p*) R. L. 1890, 92; *In re Hume*, 35 Ch. D. 457; R. S. C., December, 1885, Ord. 38, r. 19A; *Trenchard's Will Trusts*, 55 L. T., N. S. 414.

(*q*) R. L. 1890, 18.

(*r*) *Re Pickance*, 10 Ha. App. 35.

(*s*) *Re Hoskins*, 4 De G. & J. 436.

(*t*) *Re Tunstall's Will*, 4 De G. & S. 421.

(*u*) *Re Sloper*, 18 Beav. 596.

(*x*) *Re Saumarez*, 8 De G., M. & G. 390; *Re Draper's Settlement*, 2 W. R. 440; *Re Wood*, 7 Jur., N. S. 323; *Re Parke's Trusts*, 8 L. T. N. S. 378.

(*y*) *Re East*, L. R., 8 Ch. 735.

(*z*) *Re Green*, L. R., 10 Ch. 272.

Applications for the appointment of new trustees should, as a rule, be served on all the *cestuis que trustent*, including infants (*a*); but service, where these are very numerous, may be dispensed with (*b*). Trustees, again, with a power of sale, sufficiently represent their *cestuis que trustent* (*c*). The Rules of 1890 direct that applications for vesting orders in lunacy are to be served according to the practice of the Chancery Division (*d*).

Where a lease contains a prohibition against assignment, an application for vesting it in another must be served on the reversioner (*e*). An application by a tenant for life must be served on the remainderman (*f*). On the other hand, an order to vest lands subject to an annuity may be made in the absence of the annuitant (*g*).

Where the application in a mortgage matter is made by the committee of the mortgagee, the mortgagor should not be served, and, if served, should not appear (*h*).

Orders by the judge.

On the hearing of the application, the judge may direct a reference to inquire into any facts requiring investigation, and order the application to stand over for the production of evidence or the service of notice (*i*). The power to direct an inquisition or a suit has been already noticed (*k*). Finally, the judge may dismiss the application with or without costs, or make an order thereupon in conformity with the provision of the act (*l*), or adjourn it into Court (*m*).

(*a*) *Re Richards' Trusts*, 5 De G. & S. 636; *Re Sloper*, 18 Beav. 596; *Re Fellow's Settlement*, 2 Jur., N. S. 62; *Re Maynard*, 16 Jur. 1084; and cf. *Re Lonsdale's Trusts*, 14 Jur. 1101; *Re Thomas' Trusts*, 15 Jur. 187; *Re Prescott's Trusts*, 19 L. T. 371.

(*b*) *Re Smyth's Settlement*, 2 De G. & S. 781.

(*c*) *Re Blanchard*, 3 De G., F. & J. 131; *In re Wilson*, 31 Ch. D. 522.

(*d*) R. L. 1890, 57.

(*e*) *Re Farrant's Trusts*, 20 L. J., N. S., Ch. 532; *Re Matthews' Settlement*, 2 W. R. 85.

(*f*) *Re Maynard's Settlement Trusts*, 16 Jur. 1084.

(*g*) *Re Winteringham's Trusts*, 3 W. R. 578.

(*h*) *Re Rowley*, 1 De G., J. & S. 417; *Re Phillips*, L. R., 4 Ch. 629.

(*i*) R. L. 1890, 19.

(*k*) Ante, pp. 283, 284.

(*l*) R. L. 1890, 19.

(*m*) R. L. 1890, 19.

Stamps on orders.

Orders having the effects of conveyances or transfers carry the corresponding stamps (*n*).

Costs.

It only remains to consider the question of costs of proceedings under the Lunacy and Trustee Acts where the trustee or mortgagee is a lunatic or person of unsound mind.

The judge in Lunacy may order the costs of vesting orders to be paid out of the land, or personal estate, or the income in respect of which the order is made, as he may think fit (*o*).

In case of trust.

(A.) 1. Where a trustee's lunacy or unsoundness of mind occasions the application, the costs are paid by the *cestui que trust*, or out of the fund, according as the proceedings are for the special benefit of the *cestui que trust* or for the general benefit of the estate (*p*).

Costs.

But 2. Where the application is for a vesting order as between vendor and purchaser, necessitated by the incapacity of the vendor, his heir or devisee, the costs are borne by the vendor's estate (*q*).

And 3. Where the application is for a vesting order as between equitable mortgagor and mortgagee, necessitated by the incapacity of the mortgagor, his heir or devisee, the costs of the mortgagor, his heir or devisee, will be postponed to those of the mortgagee (*r*).

In case of mortgage.

(B.) Where a mortgagee's lunacy or unsoundness of mind occasions the application, then—

1. If he is beneficially interested in the mortgage money, and has a committee, and the committee makes the appli-

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(*n*) 15 & 16 Vict. c. 55, s. 13.

(*o*) 53 Vict. c. 5, s. 142.

(*p*) Lewin on Trusts, p. 1038; *Ex parte Pearce*, Turn. & R. 325; *Re Tuffnell*, *cit. ap.* 1 J. & W. 265; *Ex parte Tutin*, 3 V. & B. 149; *Re Fulham*, 15 Jur. 69; and cf. *Re Marrow*, Cr. & Ph. 142. But see *Re Garden*, 34 L. J., N. S., Ch. 466, where the lords justices refused to make an order as to costs.

(*q*) *Heard* v. *Cuthbert*, 2 Ir. Ch. Rep. 369; *Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584.

(*r*) See *Cook* v. *Hart*, L. R., 12 Eq. 459, and the cases there cited.

cation, the costs of the proceedings will be borne by the estate (*s*). Costs.

The mortgagor should not be served in such a case, and, whether served or not, he will not be allowed his costs of appearance (*t*).

2. If the mortgagor make the application where the lunatic has a committee, and the committee has not declined to act, he must himself bear the costs (*u*).

3. If there is a committee, who declines to act, though the case is a proper one, he might probably be ordered to pay the costs himself.

4. If there is no committee, the mortgagee not having been found a lunatic, it is probable that there would be no order as to costs, the court being very unwilling to make the mortgagee pay the mortgagor's costs (*x*).

5. If the lunatic or person of unsound mind is only the heir or devisee of the mortgagee, and a bare trustee of the legal estate, the costs must ordinarily be borne by the mortgagor, whether the mortgage money has or has not been paid (*y*).

6. So if it appears on the face of the mortgage deed that

(*s*) *Re Wheeler*, 1 De G., M. & G. 434; *Re Thomas*, 22 L. J., N. S., Ch. 858; cf. *Re Biddle*, 23 L. J., N. S. Ch. 23; *Re Stuart*, 4 De G. & J. 319; and a number of unreported cases *cit. ap. Re Wheeler*, *ubi sup.* It seems, however, that the mortgagor should pay the stamp; *Re Thomas*, *ubi sup.*

(*t*) *Re Rowley*, 1 De G., J. & S. 417. The report of *Re Rowley*, in 7 L. T., N. S. 702, and 1 N. R. 251, does not go so far. But see, conclusively, *Re Phillips*, L. R., 4 Ch. 629; R. L. 1890, 57.

(*u*) *Re Wheeler*, 1 De G., M. & G. 434. On the other hand, see *Ex parte Richards*, 1 Jac. & W. 264. In *Re Viall*, 8 De G., M. & G. 439, part of the costs.

(*x*) In *Re Marrow*, Cr. & P. 142, the whole costs were, by consent, thrown on the mortgagor; but see Lord Cottenham's dictum, p. 146. In *Re Biddle*, 23 L. J., N. S., Ch. 23, the costs were ordered to be paid out of the mortgage debt. In *Re Viall*, 8 De G., M. & G. 439, 10*l.* of the costs were paid out of the mortgage money; In *In re Sparks*, 6 Ch. D. 361, it was held that the court had no jurisdiction to make the mortgagee pay the costs.

(*y*) *Ex parte Clay*, Shelf. on Lun. 509, 510, where the money had not been paid; *Re Stuart*, 4 De G. & J. 319; *Re Jones*, 2 De G., F. & J. 554, where it had.

the mortgagee is a trustee for a third party, the mortgagor pays the costs (*z*).

7. On the other hand, if the mortgagor has no notice that the mortgagee was a trustee, the costs will follow the general rule applicable where the application is rendered necessary by a trustee's incapacity, and be paid out of the fund (*a*).

On the subject of costs generally, see the Chapter on the costs of proceedings in lunacy (*b*).

(*z*) *Re Lewis*, 1 Mac. & G. 23.

(*a*) *Re Townshend*, 1 Mac. & G. 686; *Re Jones*, 2 Ch. D. 70.

(*b*) Ante, p. 216.

CHAPTER V.

POWERS, ETC., VESTED IN A LUNATIC.

Powers of consent, &c., where the lunatic is so found.

WHERE a power is vested in a lunatic as trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of a power, and it appears to the judge to be expedient that the power should be exercised, or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs (*a*).

Under the above stated power the court has authorized a committee to consent on behalf of a lunatic to the exercise of a power of advancement in a marriage settlement (*b*).

Power of appointing new trustees.

Where the power so exercised is a power of appointing new trustees, the person or persons who, after and in consequence of the exercise of the power, is or are the trustee or trustees, have all the same rights and powers as he or they would have had, if the order had also been made by the High Court of Justice, and the judge, as hereafter pointed out, will have the like powers to make orders as if the case had been one under the Trustee Acts (*c*).

In a case where the lunatic was a mortgagee, and it was desired to exercise the power of sale in the mortgage, the

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(*a*) 53 Vict. c. 5, s. 128; *In re Blake*, W. N. 1887, p. 173, and for consent under the Marriage Acts, see 4 Geo. 4, c. 76, s. 17; *Ex parte Reiley*, 7 Jur. 589; and post, c. 13, pl. 22; for ecclesiastical properties, 5 & 6 Vict. c. 27, s. 7; 5 & 6 Vict. c. 108, s. 24. As to joint power, see *In re Lord Kilworth*, L. R. 11 Eq. 612.

(*b*) *In re Nevill*, 31 Ch. D. 161.

(*c*) 53 Vict. c. 5, s. 129.

Court only directed the committee to sell under s. 136 of the L. R. Act, 1853, leaving the conveyance of the legal estate to be dealt with by a subsequent application under the Trustee Act, 1850 (*d*).

The judge may, under these powers, where it seems to him to be for the lunatic's benefit and expedient, make any and every such order respecting the land or stock or choses in action, subject to the trust as might have been made in the same case under the provisions of the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees (*e*).

However, the power inherent in the High Court of appointing trustees under sect. 32 of the Trustee Act is not ousted (*f*), though where the donee of the power has been found lunatic by inquisition, the committee should be served (*g*).

Power of leasing.

The exercise by the committee, under the sanction of the court, of a power of leasing vested in the lunatic has been already referred to (*h*).

No authority in committee independent of statute.

Independently of statutory enactment, the committee cannot, either with or without the sanction of the court, exercise powers vested in the lunatic, whether the power be a naked power or a power coupled with an interest (*i*). That the terms of the instrument creating the power might authorize the exercise of a power by the committee

No authority in lunatic himself.

of a lunatic is indeed probable; but a lunatic cannot by words, however aptly framed, be authorized to exercise a power himself (*k*). Where there is a power exercisable

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(*d*) *In re Harwood*, 35 Ch. D. 470. See now 53 Vict. c. 5, s. 120 (*l*).

(*e*) 53 Vict. c. 5, s. 129. For form of order, see *Re Bowmer*, 3 De G. & J. 658.

(*f*) *Re Parker's Trusts*, 32 Beav. 580; *Re Sparrow's Trusts*, 18 W. R. 1065, 1185; *Re John Heaphy's Trust*, 18 W. R. 1070.

(*g*) *Re Parker's Trusts, ubi sup.*

(*h*) Ante, pp. 168 *et seq.*

(*i*) *Hansell* v. *Hansell*, Wilm. Notes, 51, 52; *Ex parte Lord Bradford*, 1 West, Cas. t. Hardwick, p. 133; *Ex parte Smyth*, 2 Swanst. 393.

(*k*) Co. Litt. 52 a, 112 a, n. (*b*); *Antrim* v. *Bucks*, 1 C. C. 17; *Gibbons* v. *Moulton*, Finch, 346; *Daniel* v. *Ubby*, W. Jones, 137; *Bayley* v. *Warburton*, Com. Rep. 494; *Rich* v. *Beaumont*, 6 Br. P. C. 152; *Wright* v. *Cadogan*, 1 Br. P.

with the consent of a lunatic, the proper course is to apply to the court for an order giving the committee leave to consent on behalf of the lunatic (*l*).

In one case Malins, V.-C., declared that the consent of a married woman, which was by the settlement required to be given by her in writing to variations in the investments, might be dispensed with, she being of unsound mind, though not so found (*m*). The Court of Lunacy has no power to appoint a "nominee" on behalf of a lunatic subscriber to the Customs Annuity and Benevolent Fund (*n*).

Lunatic Protector of a Settlement.

Lord chancellor in lunacy protector.

Where a lunatic, whether so found or not, is, or but for his disability would be, the protector of a settlement under the Abolition of Fines and Recoveries Act, the judge in lunacy is the protector of the settlement in his room, and has, on application in a summary way by a tenant in tail under the settlement, full power to consent to any disposition under the act by such tenant in tail, which he may approve of (*o*).

Practice.

No further evidence of the judge in lunacy having consented beyond this order is necessary (*p*); but where there is another person joint protector with the lunatic, the consent of the other person must also be given in the ordinary way (*q*).

Where lunatic protector is tenant in tail in possession.

After some discussion (*r*), it is now settled that the court has jurisdiction, not merely where a lunatic protector is tenant for life, but also where he is tenant in tail in possession; and the application is made by a tenant in tail in remainder (*s*).

C. 486; Chance on Powers, ss. 595 *et seq.*

(*l*) *In re Garrod*, 31 Ch. D. 164.

(*m*) *In re T.*, 15 Ch. D. 78.

(*n*) *Urquart* v. *Butterfield*, 36 Ch. D. 55.

(*o*) 3 & 4 Will. 4, c. 74, s. 48.

(*p*) Ib. s. 49; 4 & 5 Will. 4, c. 92, s. 49.

(*q*) 3 & 4 Will. 4, c. 74, s. 48; ss. 42—46; 4 & 5 Will. 4, c. 92, ss. 40, 41.

(*r*) *Re Blewitt*, 3 M. & K. 250; *Re Wood*, 3 Myl. & Cr. 266.

(*s*) *Re Blewitt*, 6 De G., M. & G. 187; and cf. Hayes' Conveyancing, 5th ed., vol. i., pp. 171, 172.

Principles governing the lord chancellor in the exercise of his power.

"As to the principle by which the public functionary is to be guided in the exercise of his powers of consenting," says Mr. Hayes, "the act is silent; but it may be collected from the decisions on applications to the lord chancellor in cases of lunatic protectors, that the power should be exercised with a view rather to support and carry out the intentions of the settlement, as by resettling the estate on the marriage of a son, than to disappoint any of its objects, much less to defeat its main purpose by simply facilitating alienation. The attention of the court does not seem to have been drawn to the analogous cases in which equity has assumed a discretionary power of directing trustees to destroy contingent remainders, and which might, it is conceived, have been cited as furnishing the general principles. In short, the judge represents the head of the family, and is bound to consider what a due regard for its interests, viewed in connection with the apparent design of the settlement, requires or forbids" (*t*).

Where tenant in tail not a direct descendant of the protector.

An application, where the tenant in tail is not a direct descendant of the protector, is not favoured (*u*).

Power of Attorney.

Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had become lunatic, if the fact of lunacy or unsoundness of mind was not at the time of the payment or act known to the person making or doing the same (*x*).

(*t*) Hayes' Conveyancing, 5th ed. vol. i., p. 175; *Grant* v. *Yea*, 3 M. & K. 245; *Re Blewitt*, 3 M. & K. 250; *Re Newman*, 2 Myl. & Cr. 112; *Re Wood*, 3 Myl. & Cr. 266; *Re Graydon*, 1 Mac. & G. 655; *Re Blewitt*, 6 De G., M. & G. 187; *In re Sparrow*, 20 Ch. D. 320; *Re Beridge*, 50 L. T., N. S., 653.

(*u*) See the cases cited in preceding note; and *Re Tharp*, 3 Ch. D. 59.

(*x*) 44 & 45 Vict. c. 41, s. 47.

CHAPTER VI.

THE LUNATIC AS EXECUTOR OR ADMINISTRATOR.

A lunatic cannot be executor or administrator.

By English, as by civil law, the lunatic cannot be executor or administrator. He cannot take upon him the execution of the trust; nor can he execute it (*a*). So if an executor or administrator becomes of unsound mind before his trust is executed, the proper court may grant administration to another (*b*).

Practice.

Lunatic sole executor or administrator.

Lunatic so found.

1. First, to take the case of the lunatic, being a sole executor or administrator. Then (a.), if he has been found lunatic by inquisition, the ordinary practice of the court is to make a limited grant of administration with the will annexed to the committee of his estate, for the use and benefit of the lunatic during the lunacy (*c*). By the consent, express or implied, of this committee, a like grant may be made to the committee of the person or a residuary legatee (*d*). When the committee renounces, the court will appoint a stranger if approved by the masters and the next of kin (*e*).

Not so found, but under L. Act, 1890.

(b.) If the lunatic has not been so found, but his property has been brought under the protection of the court of lunacy by virtue of the L. Act, 1890, administration

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(*a*) Godolph. pt. ii. c. 5, s. 2; Bac. Abr. "Executors" (A) 5; 2 Robert. 133, 134; Williams on Executors.

(*b*) *Hill* v. *Mills*, 1 Salk. 36; *Anon.*, 1 Cas. temp. Lee, 625; *Evans* v. *Tyler*, 2 Robert. 128, 134; and see also *Offley* v. *Best*, 1 Sid. 373; also 4 Burn, E. L. 292; Com. Dig. Administrators (B), 8; Williams on Executors.

(*c*) *In the goods of Phillips*, 2 Add. 336, n. (*b*). Similar letters of administration are called in 1 Oughton, tit. 219, s. 1, *literæ administrationis durante corporis aut animi vitio.*

(*d*) *In the goods of Scarlett*, 27 L. T., N. S. 215; *In the goods of Milnes*, 3 Add. 55.

(*e*) *In the goods of Grace Hastings*, 4 P. D. 73.

pending the lunacy is granted to the person appointed under that act to take care of his person and estate (*f*).

In other cases.

(c.) Where the case falls under neither of these heads, the court grants administration pending the lunacy to the next of kin or some other person, for the use and benefit of the lunatic; but it must, in the first instance, be satisfied by affidavit, that no proceedings in lunacy have been taken, and it requires sureties in double the amount, and that they shall have justified (*g*).

Lunatic not absolutely passed over.

Thus the lunacy of the person who, but for the disability, would have been the proper person to administer, will not usually induce the court to pass him entirely over; and even where some person more remotely connected with the deceased, as the next of kin or a creditor, is appointed, it is generally a limited grant of administration, and for the use and benefit of the lunatic (*h*).

Citation of next of kin of the lunatic.

It is apparently in the discretion of the court to excuse the citing of the next of kin of the lunatic in granting administration for his use and benefit during the lunacy (*i*).

Where lunatic one of several executors or administrators.

Practice.

2. Where one of several executors or administrators becomes lunatic, the proper course is to bring in the joint probate or joint letters of administration, as the case may be; and the court will thereupon revoke the joint grant, and grant a fresh probate or fresh letters of administration to the continuing executors or administrators (*k*). In the

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(*f*) *In the goods of Slumbers*, 34 L. J., N. S., P. & D. 93.

(*g*) *Ex parte Evelyn*, 2 M. & K. 4; *Evans* v. *Tyler*, 2 Robert. 128; *In the goods of Crump*, 3 Phill. 497; *In the goods of Hardwicke*, 1 Hagg. Cons. 483; *In the goods of Joseph*, 1 Curt. 907; *Mile End Old Town* v. *Findlay*, 9 L. T., N. S. 346; *In the goods of Sharland*, 25 L. T., N. S. 574; and cf. *Windeatt* v. *Sharland*, L. R., 2 P. & D. 217; *In the goods of Espinasse*, 3 L. R., Ir. 185; and the cases cited in the following note.

(*h*) See the cases cited in the preceding note, and *In the goods of Penny*, 4 N. of C. 659; *In the goods of Binckes*, 1 Curt. 286; *In the goods of Espinasse*, 3 L. R., Ir. 185.

(*i*) *In the goods of Southmead*, 3 Curt. 28; but see *In the goods of Sharland*, 25 L. T., N. S. 574.

(*k*) *In the goods of Phillips*, 2 Add. 335; *In the goods of Marshall*, 1 Curt. 297; *In the goods of Newton*, 3 Curt. 428; cf. Williams on Executors, 519, 520.

former case, the court will reserve power to grant probate to the lunatic executor when he shall become of sound mind and apply for the same (*l*).

If the lunatic executor has been so found, the committee will, it appears, be required to concur in bringing in the probate or letters, and to consent to the new grant (*m*).

Wife of a lunatic executrix.

It may be added, that when the wife of a lunatic has been appointed a co-executrix, she will not be restrained from proving the will, though she may be from intermeddling with the property (*n*).

(*l*) *In the goods of Marshall, ubi sup.*

(*m*) *In the goods of Phillips, ubi sup.*

(*n*) *Yetts* v. *Palmer*, 8 L. T., N. S. 528; *In the goods of Connor*, 3 L. R., Ir. 283.

CHAPTER VII.

INSANITY IN RELATION TO CERTAIN ACTS OF PARLIAMENT AFFECTING LANDED PROPERTY.

Procedure generally.

With regard to the subject-matter of this chapter generally, it is to be noticed that in all cases in which the judge has under the Land Clauses Acts, the Settled Estates Act, 1877, the Settled Land Acts, 1882, 1884, or any other enactment, jurisdiction to make an order upon petitions affecting the property of a lunatic, the application for the order shall, unless the judge in a particular case otherwise directs, be made by summons at chambers before the masters (*a*).

Sect. 1.—*Leases and Sales of Settled Estates Acts and Settled Land Act*, 1882.

Where lunatic so found.

All powers given by these acts (*b*), all applications to the court thereunder, and all consents to such applications, may be exercised, made or given by committees on behalf of lunatics so found by inquisition (*c*).

Sanction of court of lunacy to be obtained ;

The committee must, however, previously obtain the authority of the court of lunacy (*d*), the evidence of which is a special certificate of the master, approved by the judge in lunacy (*e*).

and of High Court. Procedure.

He must also obtain the special direction of the court in which the application is made (*f*). This he will do *ex*

(*a*) R. L., 1890, 16.

(*b*) 19 & 20 Vict. c. 120 ; 21 & 22 Vict. c. 77 ; 27 & 28 Vict. c. 45 ; 37 & 38 Vict. c. 33 ; 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18.

(*c*) 19 & 20 Vict. c. 120, s. 36.

(*d*) *Re Woodcock's Estate*, L. R., 3 Ch. 229.

(*e*) Ib.; and cf. Dan. Ch. Pr. 2305.

(*f*) 19 & 20 Vict. c. 120, s. 36.

parte by summons at the chambers of the judge (*g*), which should be taken out as a rule after the application in lunacy, and should be entitled in the same manner, issued in the name of the committee, and be in the form of an ordinary summons. The summons should be supported by an affidavit of the committee, that he believes it to be proper and for the benefit of the lunatic that the application proposed to be made should be made or consented to on behalf of the lunatic; and such other evidence should be adduced as may be required to show its propriety so far as the lunatic is concerned (*h*).

The authority of the court of lunacy should also be produced (*i*). The order is drawn up by the registrar in the usual manner (*k*).

Where lunatic not so found.

The above directions obviously do not apply to the case of a person of unsound mind who has not been found lunatic by inquisition. An application on behalf of such a person would probably be construed a contempt of the court of lunacy (*l*); but provisions exist to meet the case where the application is made by other parties.

Procedure.

For this purpose a notice must be served personally on the person of unsound mind, and a copy left with the person in whose charge he is (*m*), requiring him to notify, within a time to be specified in the notice, whether he assents to or dissents from the application, or submits his rights and interests, so far as they may be affected by the application, to be dealt with by the court. The notice must further specify to whom and in what manner the notification is to be delivered and left (*n*).

If no notification is delivered or left in accordance with the notice, and within the time thereby limited, the person

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(*g*) Cons. Ord. XLI. 23.

(*h*) Reg. 8 Aug. 1857, r. 22.

(*i*) *Re Woodcock*, L. R., 3 Ch. 229, 230.

(*k*) Dan. Ch. Pr. 2308; and see Seton, 528, n. (2).

(*l*) Conf. post, p. 324.

(*m*) 37 & 38 Vict. c. 33, s. 2; *Re Crabtree's Settled Estates*, L. R., 10 Ch. 201.

(*n*) 37 & 38 Vict. c. 33, s. 2.

of unsound mind will be deemed to have submitted his rights and interests to be dealt with by the court (*o*).

Under these circumstances it is unnecessary to decide the previously-disputed question whether a guardian could be appointed to consent on behalf of a lunatic not so found (*p*).

Service dispensed with, qu.

It may also be doubted whether the discretion of the court would any longer be exercised to dispense with service on persons of unsound mind not so found, who are only remotely or contingently interested (*q*), though it must be admitted that such dispensation has been made in the case of a sane person under similar circumstances (*r*).

Payment of the proceeds of the sale of a lunatic's real estate sold in a partition suit into court to the credit of the lunacy, is not a payment "to a person becoming absolutely entitled" within the meaning of s. 23 of the Settled Estates Act (*s*).

Lunatic tenant for life.

By s. 62 of the Settled Land Act, 1882 (*t*), where a tenant for life, or a person having the powers of a tenant for life under the act, is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf under an order of the lord chancellor or other person intrusted by virtue of the queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under the act, and the order may be made on the application of any person interested in the settled land or of the committee of the estate. Neither the case of a lunatic not so found nor the case of a person of weak mind is within the section.

(*o*) 37 & 38 Vict. c. 33, ss. 2, 3.

(*p*) *Venner's Settled Estates*, L. R., 6 Eq. 249; *Re Clough's Estate*, L. R. 15 Eq. 284. The latter case, a hostile one, decided that a guardian could not be appointed.

(*q*) See *Re Franklin's Settled Estates*, 7 W. R. 45; *Re Turbutt's Estate*, 2 N. R. 158.

(*r*) *Re Marquis Cholmondeley*, W. N. 1866, p. 388.

(*s*) 19 & 20 Vict. c. 120, s. 23; *In re Barker*, 17 Ch. D. 241.

(*t*) 45 & 46 Vict. c. 38. Vaizey on Settlements, p. 732.

The committee of a lunatic tenant for life must obtain an order in lunacy in order to enable him to give the notice to the trustees required by s. 45 of the Settled Land Act, 1882 (*u*); and where the committee desires to exercise the leasing powers given by the S. L. Act, 1882, if there are no trustees in existence trustees must be appointed for the purposes of the act (*x*).

Notice to the trustees.

Sect. 2.—*Ecclesiastical Commissioners Acts.*

Under the 23 & 24 Vict. c. 124, the trustees of a lease granted by any ecclesiastical corporation, and who have no power of sale, may sell the same with the consent of the persons entitled to the rents. If there is no person capable of giving consent or it be withheld, the trustees may sell with the approbation of the Chancery Division of the High Court (*y*). Where the person entitled to the rents is a lunatic not so found, the application need not be entitled in lunacy, and the order may be made in the High Court alone (*z*). Where the lunatic has been so found, it would probably be necessary to obtain the approval of the judge in lunacy (*a*).

Trustees of lease may sell with consent of Chancery Division of High Court.

Sect. 3.—*The Lands Clauses Consolidation Act and Acts incorporating the same or conferring similar Powers.*

The Lands Clauses Consolidation Act, as that of most general application, may be taken as an example.

8 & 9 Vict. c. 18.

By sect. 7 of this act, the committee of a lunatic so found is entitled to sell, convey, or release on his behalf as fully as he might have himself done if sane. Nevertheless, the committee must obtain the leave of the judge in lunacy

Power of committee.

Leave of the court required.

(*u*) *In re Ray's Settled Estates*, 25 Ch. D. 464.

(*x*) *In re Taylor*, 52 L. J., N. S., Ch. 728.

(*y*) 23 & 24 Vict. c. 124, s. 38; see also sect. 36 as to raising moneys for renewal.

(*z*) *Re Cheshire*, L. R., 7 Ch. 50.

(*a*) Conf. *Re Woodcock*, L. R., 3 Ch. 229, 230.

first (*b*). Even the promoters, when intending to exercise their compulsory powers upon the estate of a lunatic so found, must apply for leave of the court, or they will be liable to an injunction (*c*).

The trustees of a lunatic *cestui que trust* have the same powers as they would have had if he had been sane (*d*).

Lunatic not so found not provided for.

No provision is made in s. 7 for the case of a lunatic not so found, seised of the legal estate (*e*). Possibly he might be brought under sect. 76, and the promoters permitted to convey to themselves by deed poll.

Consideration how assessed.

The consideration, in case of lunacy, must be assessed either by a jury, by arbitration, by valuation of a surveyor under sect. 59, or by valuation of two surveyors under sect. 36.

Limit on purchase from lunatic.

Only so much land may be bought from a lunatic as is required for the undertaking, and if promoters sell what they have already bought, they cannot buy more (*f*).

Purchase-money, &c., how paid.

Purchase or compensation-money for the land of a lunatic so found, or any interest therein, amounting to 200*l.* or upwards, is paid into the bank in the ordinary way of moneys paid into court, to the account of the paymaster-general, *ex parte* the promoters of the undertaking in the matter of the special act, until applied to some one of the purposes presently mentioned (*g*). When the lunatic is so found, a direct order may, however, be made by the judge in lunacy, on summons entitled in the Chancery Division and in lunacy, and in the matters of the act and of the lunacy, for payment of the purchase-money to the credit of the lunacy and its investment in the joint names of the lunatic and the company, without its first being paid into court (*h*).

(*b*) *Re Briscoe*, 2 De G., J. & S. 249; *Re Walker*, 7 Railw. Cas. 129; *Re Taylor*, 1 Mac. & G. 210.

(*c*) *Re Taylor*, 6 Railw. Cas. 741; cf. *Tink* v. *Rundle*, 10 Beav. 318.

(*d*) 8 & 9 Vict. c. 18, s. 7.

(*e*) *In re Tugwell*, 27 Ch. D. 309.

(*f*) 8 & 9 Vict. c. 18, s. 14.

(*g*) Ib. ss. 69, 70; *In re Brown*, 38 W. R. 529.

(*h*) *Re Milnes*, 1 Ch. D. 28.

Purchase or compensation-money between 20*l.* and 200*l.* may be either paid into court, as above, or to two trustees, to be nominated by the committee, and approved by the promoters (*i*).

Purchase or compensation-money not exceeding 20*l.* is paid to the committee (*k*).

Where the promoters proceed, if in fact they can proceed at all, under sect. 76, the purchase-money will have to be deposited as therein mentioned, and dealt with under the direction of the Chancery Division of the High Court.

Application of purchase or compensation-money.

Purchase or compensation-money paid into court or to trustees may be applied as follows (*l*), viz.:—

1. In the purchase or redemption of the land-tax, including the reimbursement of the estate by which the land-tax has been already redeemed.

2. In the discharge of any debt or incumbrance affecting the land, in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts or purposes.

3. In the purchase of other lands, which must generally be of the same character (though, for example, copyholds have been substituted for freeholds (*m*)), to be conveyed, limited and settled to and for the same uses, trusts and purposes, and in the same manner as the lands, in respect of which the moneys have been paid, stood settled. An investment in guaranteed stock of the Great Indian Peninsular Railway Company has been permitted (*n*).

Where the property purchased was a rent-charge issuing out of land for the life of the lunatic, the court authorized the purchase of a government annuity for the same life and amount (*o*).

(*i*) 8 & 9 Vict. c. 18, s. 71.

(*k*) Ib. s. 72.

(*l*) See Ib. s. 69; and cf. Hodges' Railw. pp. 353 *et seq.*, and the notes.

(*m*) *Re Cann's Estate*, 19 L. J., N. S., Ch. 396; 15 Jur. 3.

(*n*) *Re Buckingham*, 2 Ch. D. 690.

(*o*) *Re Brewer*, 1 Ch. D. 409.

4. In erecting new buildings upon any land settled upon the like uses, trusts and purposes, and in the same manner as those upon which the lands, in respect of which the moneys have been paid, stood settled.

Also, where the sums are small or special circumstances exist, in rebuilding or other permanent improvement.

And, in any case, if the money has been paid in respect of any buildings taken under the authority of the act or of any special act, or injured by the proximity of the works, in removing or replacing the buildings or substituting others in their stead, in such manner as the High Court of Justice (Chancery Division) may direct.

5. In payment to any person becoming absolutely entitled to the money. For the character in which the money is taken, see Chapter XII., post, p. 362.

Order for application of purchase-money, &c.

In order that the money may be applied for any of these purposes, it is necessary to obtain an order from the court. This is procured on the application of the lunatic or idiot by his committee (*p*). The leave of the court in lunacy is also required (*q*).

Interim investment.

In the meanwhile the money may, upon the like order, be invested by the paymaster-general in the purchase of 3*l.* per cent. consolidated or 3*l.* per cent. reduced bank annuities, or upon government or perhaps real securities, and the interest, dividends and annual income paid to the committee (*r*).

The practice in relation to these applications, and generally as to this subject, is treated in Mr. Hodges' work on Railways, Chapter VII.

(*p*) 8 & 9 Vict. c. 18, s. 70.

(*q*) *Re Taylor*, 1 Mac. & G. 210; cf. *Re Briscoe*, 2 De G., J. & S. 249; *Re Walker*, 7 Railw. Cas. 129.

(*r*) 8 & 9 Vict. c. 18, s. 70.

Sect. 4.—*The Enfranchisement Acts.*

The Enfranchisement Acts contain special provisions for the case of insanity in the lord, the tenant, or any other person interested in any question or right, connected with any commutation or enfranchisement; and that, apparently, whether he have been found lunatic by inquisition or not (*s*).

(*s*) See generally 4 & 5 Vict. c. 35, s. 11; as to payment of moneys where the person entitled to them is under disability, 4 & 5 Vict. c. 35, ss. 73, 74, 75, 78; 15 & 16 Vict. c. 51, ss. 39, 40; as to sale of rent-charge, 15 & 16 Vict. c. 51, s. 36.

CHAPTER VIII.

OF THE RESPONSIBILITY OF LUNATICS FOR CIVIL DELICTS.

ALTHOUGH an insane person stands upon a different footing to the ordinary citizen in regard to crime (*a*), yet if he commit a trespass or other offence against the person or property of others, he is responsible for it, and may be compelled to make satisfaction in damages (*b*). In such a case the intention is immaterial, if the act done is prejudicial; and it is to this that the *dictum* in *Ridler* v. *Ridler* applies, where it was said that the rule that a man may not stultify himself by setting up his own insanity is to be understood of acts done by the lunatic to the prejudice of others, that he should not be admitted to excuse himself on the pretence of lunacy, but not as to acts done by him to the prejudice of himself (*c*).

(*a*) Post, p. 384.

(*b*) *Haycraft* v. *Creasy*, 2 East, 104, per Kenyon, C. J.; *Weaver* v. *Ward*, Hob. 134; Bac. Abr. tit. Id. and Lun. (E); 2 Roll. Abr. 547, pl. 4; Bacon's Elements of the Laws of England, p. 31; 1 Hale, P. C. 16.

(*c*) *Ridler* v. *Ridler*, 1 Eq. Abr. 279.

CHAPTER IX.

INSANITY IN RELATION TO THE PROCEDURE OF CIVIL COURTS.

Right of the insane to sue once denied.

Gradually admitted.

In the early days of English law the capacity of idiots, madmen and such as are born deaf and dumb, to sue at all was expressly denied (*a*). The right, however, had been generally admitted before Lord Coke's time, though with a distinction in the practice of the common law courts, which is now unimportant, between the idiot and the lunatic, where no committee had been appointed (*b*). In chancery there existed, from very early times, a method of appointing protectors of the interests of such insane parties to suits as were not already under the protection of committees, or whose interests in the suit were adverse to those of their committees. These protectors were called next friends or guardians, according as they were appointed protectors of plaintiffs or of defendants respectively (*c*).

Old practice in chancery.

Practice under the Judicature Act adapted to this.

By the rules under the Judicature Acts, the procedure in the case of lunatics, whether so found or not, is in all cases assimilated to the previous procedure in chancery (*d*).

Sect. 1.—*Where the Lunatic is Plaintiff or Petitioner.*

The lunatic having been found so by inquisition.

(A.) Where the lunatic has been so found by inquisition, the proper person to institute an action, present a petition,

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(*a*) Co. Litt. 135 b; and cf. Staundf. de Prer. Reg. 33, 34; Bracton, lib. 5, f. 421.

(*b*) Brooke, Abr. tit. Idiot; Bac. Abr. tit. Id. and Lun. (G); 4 Rep. 124 b; Co. Litt. 135 b, and Harg. note; *Dennis* v. *Dennis*, 2 Saund. Rep. 328; *Dennis* v. *Phrazier*, 2 Keb. 691, 752.

(*c*) *Sherwood* v. *Sanderson*, 19 Ves. 289.

(*d*) R. S. C. 1883, Ord. XVI. r. 17. See generally on the subject treated of in this chapter "The Annual Practice," s. v. "Lunatic."

or take out a summons on his behalf is the committee of his estate (*e*). Any other person interfering in his interest does so at the risk of being himself saddled with the costs of the proceedings (*f*); and that even though he be the receiver of the lunatic's estate, duly appointed and acting *bonâ fide* in the matter (*g*).

The committee should be a party as plaintiff or defendant in every case.

Where the action is thus brought by the committee, it is proper to join the lunatic who sues by his committee and the committee who sues in his own name as co-plaintiffs (*h*). The old doctrine, already noticed, that no man can be heard to stultify himself may be regarded as altogether exploded (*i*).

Similarly, the lunatic should be joined with his committee as co-applicant in any application to the High Court affecting his property (*k*).

At the same time, if the committee has an interest in the cause of action adverse to the lunatic, the ordinary rule must be departed from, and the lunatic sue by a next friend (*l*). The procedure is then the same as that, presently mentioned, in the case of a lunatic not so found (*m*). The committee will be before the court as a defendant (*n*).

Leave of the court of lunacy to be obtained.

The committee must not institute an action without obtaining the special leave of the court of lunacy, or

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(*e*) 1 Dan. Ch. Pr. 116; R. S. C. 1883, Ord. XVI. r. 17; cf. Co. Litt. 135 b. For cases under 53 Vict. c. 5, s. 116, vide ante, p. 230. The Judicature Rules do not apply to lunacy proceedings except where lunacy is expressly referred to, *In re Hume*, 35 Ch. D. 457.

(*f*) *Beall* v. *Smith*, L. R., 9 Ch. 85.

(*g*) *Re Montgomery*, 1 Moll. 419; *Re Kilkenny*, 7 Ir. Eq. Rep. 594; *Re Doolan*, 2 Con. & Law, 232.

(*h*) 1 Dan. Ch. Pr. 117; *Woolfryes* v. *Woolfryes*, Rolls, Feb. 17, 1824, MSS.

(*i*) Ante, pp. 244 *et seq.*

(*k*) *Re Bourke*, 2 De G., J. & S. 426.

(*l*) The same course may be adopted when the court of lunacy is of opinion that a question should be tried, but not at the expense of the lunatic's estate, *Re Gordon*, L. R., 10 Ch. 192.

(*m*) Infra, p. 324.

(*n*) *Fuller* v. *Lance*, 1 Ca. in Ch. 19; *Bishop of London* v. *Nicholls*, Bunb. 141.

he may have his costs disallowed on the passing of his accounts (*o*).

Permission how obtained.

This necessary permission is obtained by taking out a summons with evidence showing the propriety of the action to the master in lunacy, and obtaining a certificate from him approving the action, confirmed by the judge in lunacy (*p*).

Plaintiff found lunatic *pendente lite*, or removal or death of committee.

On a plaintiff being found lunatic, or on the death, removal, or retirement of the existing committee, *pendente lite*, the committee or new committee may be made a party to the action (*q*).

The application should be made at chambers, *ex parte*, upon an allegation of the facts (*r*). It does not appear that any evidence is necessary, but it might be as well, perhaps, to be prepared with the usual evidence of the new committee's appointment.

The order will, unless the court or a judge otherwise direct, be served on the other parties (*s*), and is, from the time of service, binding on every party being a person under no disability, a married woman, or a person having a guardian in the action (including, presumably, a person having a committee or next friend), unless the party applies, within twelve days of service, to discharge or vary it (*t*). On all other parties it is binding only after the expiration of twelve days from the appointment of a guardian or guardians *ad litem* (*u*).

Where *curator* appointed by a foreign jurisdiction.

(B.) Whatever may have been the rule at common law, as to which there is some doubt (*x*), a *curator bonis* of a

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(*o*) 1 Dan. Ch. Pr. 181, 309; *Simpson* v. *L. & N. W. Rail. Co.*, 1 N. R. 562; *Re Notley*, 3 Jur. 719; *Foot* v. *Leslie*, 16 L. R. Ir. 411.

(*p*) 1 Dan. Ch. Pr., p. 118.

(*q*) 1 Dan. Ch. Pr., p. 118.

(*r*) R. S. C. 1883, Ord. XVII. r. 4. For the old practice, see 15 & 16 Vict. c. 86, s. 52; *Dangar* v. *Stewart*, 3 L. T., N. S. 770; *Simpson* v. *L. & N. W. Rail. Co.*, 1 N. R. 562.

(*s*) R. S. C. 1883, Ord. XVII., r. 5.

(*t*) Ib. r. 6.

(*u*) Ib. r. 7.

(*x*) See Shelf. on Lun., p. 513; *Morrison* v. *Earl of Sutherland*, Dict. of Decisions, ii. 199; *Gordon* v. *Stair*, 13 Shaw, D. B. & M. 1073.

lunatic, appointed by any Scotch, colonial or foreign court of competent jurisdiction, could sue in the English courts of equity in respect of debts due to the lunatic (*y*).

In the title of the bill the lunatic was still expressed to be suing by his *curator* and next friend (*z*); a similar rule will now extend to all divisions of the High Court.

It has been repeatedly decided that such a *curator bonis* may properly apply for payment out to him of money or stock in court to which the lunatic is entitled, though the court has a discretion in granting the application (*a*).

So it seems, that a committee appointed by the court of lunacy in England might sue on behalf of the lunatic in the Scotch courts (*b*).

Where lunatic not so found.

(C.) Where the lunatic is not so found by inquisition, he can only institute an action by his next friend, as an infant does (*c*).

Next friends. Risk of personal liability.

Persons who voluntarily offer themselves for the post of next friends do so entirely at their own risk, and must be prepared to vindicate the necessity and propriety of their proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings. Their action may be wholly repudiated by the lunatic if he should recover his reason (*d*).

Risk of being held guilty of a contempt.

Again, a next friend needs to be very careful that his proceedings do not involve him in a contempt of the court of lunacy (*e*). The general character of the relief given by courts of equity seemed to tempt suitors to apply to them for assistance where the injury was in any respect connected

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(*y*) *Scott* v. *Bentley*, 1 K. & J. 281; *In re Barlow's Will*, 36 Ch. D. 287; *Grimwood* v. *Bartels*, 46 L. J. Ch. 788; 53 Vict. c. 5, s. 131.

(*z*) Ib.

(*a*) *Re Albo's Trusts*, 11 W. R. 80; *Newton* v. *Manning*, 1 Mac. & G. 362; 53 Vict. c. 5, s. 131.

(*b*) *Re Morison*, cit. 2 Ves. 37; *Sill* v. *Worswick*, 1 H. Bl. 677; *Scott* v. *Bentley*, 1 K. & J. 281; but see *Morrison* v. *Sutherland*, Dict. of Decisions, ii. 199; *In re Barlow's Will*, 36 Ch. D. 287.

(*c*) 1 Dan. Ch. Pr. 116; R. S. C. 1883, Ord. XVI. r. 17.

(*d*) See *Beall* v. *Smith*, L. R., 9 Ch. 85, 95; and generally, 1 Dan. Ch. Pr. 116 *et seq.*

(*e*) See *Beall* v. *Smith*, *ubi sup.*

with weakness of mind and imbecility. Yet it was repeatedly stated in those courts that they had no jurisdiction over the property of persons of unsound mind unless such persons were brought regularly within their ordinary jurisdiction; and then only within certain limits (*f*); indeed, it was at one time thought that a bill could not be filed by a next friend on behalf of a person of unsound mind, not so found, for the purpose of dealing with his real estate (*g*). But it has since been decided that an action which is *primâ facie* for the benefit of a person of unsound mind (*e.g.*, a partition action) may be brought by the next friend (*h*). An action for the recovery of land is properly instituted in the name of the next friend, but may be stayed if the court is of opinion that it is not beneficial to the lunatic (*i*). On the other hand, it seems that such a bill might have been filed for the protection of the lunatic's property from specific damage, as for restraint of injury, dissolution of partnership, and the like (*k*). In such cases the ordinary jurisdiction of the court is not destroyed by the insanity of the plaintiff. At the same time it is probable that, where the taking of accounts is involved, a final decree will not be pronounced without an application to the jurisdiction in lunacy (*l*); while, in one case, where proceedings in lunacy against the plaintiff were commenced after decree, all proceedings in the suit were stayed until the result of the proceedings in lunacy should be known (*m*).

Certain actions may not be brought on behalf of a lunatic not so found.

Where action may be brought it may still be necessary to apply to lunacy.

The nearest relation is *primâ facie* the proper person to

Who will be

(*f*) See *Beall* v. *Smith*, *ubi sup.*

(*g*) *Halfhide* v. *Robinson*, L. R., 9 Ch. 373.

(*h*) *Watt* v. *Leach*, 26 W. R. 475; *Porter* v. *Porter*, 37 Ch. D. 420.

(*i*) *Waterhouse* v. *Worsnop*, 59 L T., N. S. 140.

(*k*) *Light* v. *Light*, 25 Beav. 248; *Jones* v *Lloyd*, L. R., 18 Eq. 265; *Fisher* v. *Mellis*, L. R. 18 Eq. 268, n.; and cf. *Beall* v. *Smith*, *ubi sup.*, and the cases on partnership, sup. p. 276.

(*l*) *Fisher* v. *Mellis*, L. R., 18 Eq. 268, n.; *Jones* v. *Lloyd*, L. R., 18 Eq. 265, 277, *et ubi sup.*

(*m*) *Hartley* v. *Gilbert*, 13 Sim. 596.

appointed a next friend.

act as next friend of a lunatic (*n*); but any person may be next friend (*o*), and the action may, in a proper case, be instituted *in formâ pauperis* (*p*).

Removal of next friend.

If the next friend does not do his duty, or if any other sufficient ground be made out, the court will, on motion or summons on notice, order him to be removed (*q*); *e.g.*, if he refuses to proceed with the cause (*r*); or if, without having been guilty of any impropriety or misconduct, he is yet so closely connected with the defendant as to render it improbable that the interest of the plaintiff will be properly supported (*s*).

Inquiry as to propriety of an action.

As a check on reckless or improper suits, an inquiry will, upon the application of the defendant or of any person acting as next friend of the plaintiff for the purpose of the application (*t*), be directed concerning the propriety of the suit (*u*), or of the conduct thereof (*x*), or the fitness of the next friend for his office (*y*). The application may be made

Practice.

(*n*) 1 Dan. Ch. Pr. 106.

(*o*) Ib., and Story, Eq. Pl. s. 58, n.; *Andrews* v. *Cradock*, Pr. in Ch. 376; *Cross* v. *Cross*, 8 Beav. 455. A defendant, however, may not be next friend, *Payne* v. *Little*, 13 Beav. 114; *Anon.*, 11 Jur, 258. But one not a person of substance may, *Anon.*, 1 Ves. jun. 410; *Squirrel* v. *Squirrel*, 2 Dick. 765; *Fellows* v. *Barrett*, 1 Keen, 119; *Davenport* v. *Davenport*, 1 S. & S. 101; *Murrell* v. *Clapham*, 8 Sim. 74; *Lindsey* v. *Tyrrell*, 24 Beav. 124; 2 De G. & J. 7; and per Wood, V.-C., in *Hind* v. *Whitmore*, 2 K. & J. 458.

(*p*) *Lindsey* v. *Tyrrell*, *ubi sup.*

(*q*) *Russell* v. *Sharpe*, 1 J. & W. 482; *Lander* v. *Ingersoll*, 4 Ha. 596.

(*r*) *Ward* v. *Ward*, 3 Mer. 706.

(*s*) *Peyton* v. *Bond*, 1 Sim. 390; *Bedwin* v. *Asprey*, 11 Sim. 530; *Towsey* v. *Groves*, 9 Jur., N. S. 194; *Gee* v. *Gee*, 12 W. R. 187; *Sandford* v. *Sandford*, 9 Jur., N. S. 398; *Lloyd* v. *Davies*, 10 Jur., N. S. 1041; *Piffard* v. *Beebye*, 14 W. R. 948; and see *Stone* v. *Wishart*, 2 Mad. 64.

(*t*) *Guy* v. *Guy*, 2 Beav. 460; and see *Jones* v. *Powell*, 2 Mer. 141; and *Taner* v. *Ivie*, 2 Ves. sen. 466.

(*u*) *Stevens* v. *Stevens*, 6 Mad. 97; *Lyons* v. *Blerkin*, Jac. 259; *Smallwood* v. *Rutter*, 9 Ha. 24; and cf. *Starten* v. *Bartholomew*, 6 Beav. 144; *Clayton* v. *Clarke*, 3 De G. F. & J. 682; and, in the court below, 2 Giff. 575.

(*x*) *Ward* v. *Ward*, 3 Mer. 706.

(*y*) *Nalder* v. *Hawkins*, 2 M. & K. 243; *Towsey* v. *Groves*, 9 Jur., N. S. 194; *Raven* v. *Keil*, 2 Phill. 692; *Gravatt* v. *Tann*, W. N. 1866, 327, on appeal; and see *Blake* v. *Smith*, Younge, 594.

by petition (*z*), but the more usual course is to apply upon motion, of which notice is given to the next friend (*a*). An objection at the hearing is too late (*b*). The application for an inquiry must be supported by strong evidence; and where the court is satisfied clearly by the affidavits in support that gross impropriety exists, a summary order (*c*) even may be made, dismissing the action with costs, or removing the next friend, and a similar order or an order for stay of proceedings may be made if the impropriety is shown on inquiry (*d*).

Next friend, how allowed to retire.

A next friend will not in general be allowed to retire at his own request (*e*) without giving security for costs already incurred, and the fitness of the next friend intended to be substituted must be substantiated by affidavit (*f*). The application to substitute a next friend in lieu of one desirous to retire is made by summons on notice to the defendants.

Death, &c. of next friend.

In case of the death, incapacity, removal, or (in the case of a woman) marriage of the next friend pending the suit, the plaintiff's solicitor should apply on summons or motion for an order appointing a new next friend (*g*). The fitness of the new next friend should be evidenced by affidavit (*h*), and an authority signed by him should be produced (*i*).

Form of the order.

The order will take the form that the proceedings in the action shall be carried on between the plaintiff by his new

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(*z*) *Da Costa* v. *Da Costa*, 3 P. Wms. 140; *Anderton* v. *Yates*, 5 De G. & S. 202.

(*a*) 1 Dan. Ch. Pr. 107.

(*b*) *Lacy* v. *Burchnall*, 3 N. R. 294.

(*c*) *Sale* v. *Sale*, 1 Beav. 586; *Guy* v. *Guy*, 2 Beav. 460; *Staniland* v. *Staniland*, M. R., 21 Jan. 1864.

(*d*) Lord Redesdale, 27; *Da Costa* v. *Da Costa*, 3 P. Wms. 140; *Richardson* v. *Miller*, 1 Sim. 133; *Anderton* v. *Yates*, 5 De G. & Sm. 202, for dismissal; *Fox* v. *Suwerkrop*, 1 Beav. 583.

(*e*) Lord Redesdale, 27, n. (*y*); Seton, 1252, n. (6); 1 Dan. Ch. Pr. 112; consider also *Davenport* v. *Davenport*, 1 S. & S. 101.

(*f*) *Melling* v. *Melling*, 4 Mad. 261; *Harrison* v. *Harrison*, 5 Beav. 130; *Lander* v. *Ingersoll*, 4 Ha. 596.

(*g*) *Westby* v. *Westby*, 2 C. P. Coop. T. L. C. 211.

(*h*) *Harrison* v. *Harrison*, 5 Beav. 130.

(*i*) R. S. C. 1883, Ord. XVI. r. 20.

next friend and the defendants. It is made *ex parte* in the first instance, and served on the other parties to the action, and is binding on the parties who are *sui juris* or femes covert, or who have guardians *ad litem*, from service, unless within twelve days they move to have it waived or discharged, and on other parties after twelve days from the appointment of a guardian *ad litem* (*k*).

Appointment of next friend at the instance of the defendant.

If the plaintiff's solicitor omits to take steps within a reasonable time for the appointment of a new next friend, the defendant may apply to the court by motion on notice for an order directing the approval of a proper person for the office (*l*).

Lunatic so found *pendente lite*.

If during an action instituted by a next friend on behalf of a lunatic not so found by inquisition, he is so found by inquisition, the suit under the old practice was absolutely paralyzed. To go on with the suit even after commencement of proceedings in lunacy was held a fraud on the jurisdiction, and every proceeding and every order taken or made thereupon was as irregular and void as if the plaintiff were then dead (*m*). The same would probably be held still. Order XVII. of R. S. C. 1883, does not expressly refer to the case of lunacy (*n*). Neither the inquisition nor the appointment of the committee constitutes an assignment, creation or devolution of an estate or title, nor can either be strictly said to cause a change or transmission of an interest or liability. On the appointment of a committee he may be made a party, under Order XVI. of the same rules (*o*).

Practice.

Action commenced in the name of a lunatic without a com-

Where an action is commenced in the name of a person who is lunatic or of unsound mind (including for this purpose those who from age, imbecility or other physical cause

(*k*) R. S. C. 1883, Ord. XVII. rr. 4—7.

(*l*) 1 Dan. Ch. Pr. 113.

(*m*) *Hartley* v. *Gilbert*, 13 Sim. 596; *Beall* v. *Smith*, L. R., 9 Ch. 85, 95.

(*n*) R. S. C. 1883, Ord. XVII. rr. 1, 2, 4; *Green* v. *Pratt*, 41 L. T., N. S. 30; *Harland* v. *Garbutt*, W. N. 1881, p. 8; *Powell* v. *Powell*, 26 Sol. J. p. 465.

(*o*) R. S. C. 1883, Ord. XVI. rr. 11—13.

are incapable of acting for themselves), and no committee or next friend is joined as a plaintiff, the defendant should apply at chambers or by motion, that all proceedings in the action may be stayed until the committee is joined as a party or a next friend is appointed (*p*). Where there is a committee the defendant may apply directly that the committee may be joined as a plaintiff (*q*). mittee or next friend.

The old practice allowed the defendant to demur or plead according as the incapacity appeared on the bill or not (*r*), and in some cases to move to take the bill off the file (*s*); but where a plaintiff merely became imbecile after bill filed, it was held not enough (*t*). Old practice.

Where an action is commenced by a next friend on behalf of a person alleged to be of unsound mind, but who is really of sound mind, it will on his application be ordered to be dismissed with costs to be paid by the next friend, those of the plaintiff as between solicitor and client and those of the defendant as between party and party (*u*). Action commenced by next friend on behalf of a person really of sound mind.

The committee or next friend conducts the whole proceedings in the action on behalf of the plaintiff, who can, through him, enjoy any remedies open to him personally but for his disability (*x*). Thus, in one case, a writ of *ne exeat regno* was granted on the application of the committee, the committee making the necessary affidavit (*y*). At the same time the committee or next friend should obtain the approval of the court or judge (*z*), and the committee that Conduct of proceedings. Leave of the court to be obtained to special steps.

(*p*) No special provision is made for this case by the Rules; but by analogy to the procedure directed in Ord. VII., that suggested in the text would seem to be proper (cf. *Woolfryes* v. *Woolfryes*, 1 Dan. Ch. Pr. p. 117). In case of continued delay, the defendant must move to dismiss the action with costs. See also Ord. XXVIII. r. 12, and Ord. LXX. rr. 1—4.

(*q*) Ord. XVI. rr. 1, 2, 11, 12.

(*r*) Lord Redesdale, 153, 229; 1 Dan. Ch. Pr. 533.

(*s*) *Wartnaby* v. *Wartnaby*, Jac. 377; *Blake* v. *Smith*, Younge, 596.

(*t*) *Wartnaby* v. *Wartnaby*, *ubi sup.*

(*u*) *Palmer* v. *Walesby*, L. R., 3 Ch. 732.

(*x*) *Coppendale* v. *Sunderland*, Barnes, 42.

(*y*) *Stewart* v. *Graham*, 19 Ves. 313; 2 Dan. Ch. Pr. 1652.

(*z*) 1 Dan. Ch. Pr. 118.

of the court of lunacy (*a*) also before consenting to any exceptional course of proceeding in the action. The next friend is not a "party" to an action, so that an order for discovery or production of documents in his own possession or power can be made against him (*b*).

SECT. 2.—*Where the Lunatic is Defendant or Respondent.*

Actions may be brought against a lunatic.

There is not the same danger of trespassing upon the lunacy jurisdiction in bringing an action against a lunatic as in bringing one on his behalf. To the person who has rights against him, the ordinary legal remedies are as open as if the lunatic had been a sane man, unless, indeed, the plaintiff stands in some such position towards the lunatic or the court of lunacy as enables that court to restrain proceedings elsewhere than before itself (*c*). Accordingly an action for partition of land (*d*) may be brought against a lunatic, and, in fact, every kind of action, *e.g.*, for dissolution of partnership (*e*), to set aside a voluntary settlement (*f*), to enforce an equity to a settlement (*g*), for specific performance of a contract (*h*), for damages on breach of contract (*i*), on civil delicts (*k*), and even for conjugal separation and dissolution of marriage (*l*). So a lunatic

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(*a*) Orders, 5th Feb. 1861, r. 24.

(*b*) R. S. C. 1883, Ord. XXXI. r. 12; *Lawton* v. *Elwes*, 31 W. R. 414; *Dyke* v. *Stephens*, 30 Ch. D. 189.

(*c*) *Re Weaver*, 2 M. & Cr. 441; *Re Ball*, 2 Moll. 145; *Stedman* v. *Hart*, Kay, 607; *Barrett* v. *Tickle*, Jac. 154; *Brockwell* v. *Bullock*, 22 Q. B. D. 567.

(*d*) Post, p. 340.

(*e*) Ante, p. 276.

(*f*) *Coleman* v. *Croker*, 1 Ves. jun. 160.

(*g*) Post, p. 338.

(*h*) *Hall* v. *Warren*, 9 Ves. 605; but see *Owen* v. *Davies*, 1 Ves. sen. 82; *Frost* v. *Beavan*, 22 L. J., N. S., Ch. 638.

(*i*) Ante, pp. 242 *et seq.*

(*k*) *Weaver* v. *Ward*, Hob. 134; ante, p. 320.

(*l*) Ante, p. 275.

may be made bankrupt (*m*), and might, under the old law, have been imprisoned for debt (*n*).

Lunatic so found.

(A.) The committee of the estate of a lunatic so found is the proper person to defend an action or to respond to a petition on his behalf (*o*). He will not be ordered to give inspection of documents in the custody of the court of lunacy (*p*). No order is required in the suit to enable the committee to defend (*q*); but the committee must obtain the sanction of the judge in lunacy before defending as before instituting an action (*r*). If the lunatic has no committee, or the committee is plaintiff, or has an adverse interest, an order appointing a guardian to defend the action (*s*), or to respond to the petition (*t*), should be obtained in the manner presently directed in the case of a lunatic not so found.

Lunatic having Irish committee.

Where a lunatic has an Irish committee, the transcript of the record should be brought into the English court, and the lunatic and committee defend together (*u*).

Service of the writ.

Where the lunatic was so found but no committee had been appointed, and the lunatic was residing in an asylum, Hall, V.-C., ordered a writ to be served on the keeper of the asylum or upon the person with whom the lunatic was residing (*x*).

Before a guardian *ad litem* can be appointed, the lunatic must have been served with the writ or petition. This is effected by service on the person with whom the person of

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(*m*) Post, p. 368.

(*n*) *Ex parte Hastings*, 14 Ves. 182; *Horne* v. *Fountain*, 23 Q. B. D. 264.

(*o*) Lord Redesdale, 30, 104; 1 Dan. Ch. Pr. 182, 237; R. S. C. 1883, Ord. IX. r. 5.

(*p*) *Vivian* v. *Little*, 11 Q. B. D. 370.

(*q*) 1 Dan. Ch. Pr. 181; *Re Manson*, 21 L. J., N. S., Ch. 249.

(*r*) Ib. No prospective order will be made as to his costs. Ib.

(*s*) Lord Redesdale, 104; 1 Dan. Ch. Pr. 159; *Snell* v. *Hyatt*, 1 Dick. 287; *Hartland* v. *Atcherley*, 7 Beav. 53; *Worth* v. *Mackenzie*, 3 Mac. & G. 363; Seton, 1251, where see form of order.

(*t*) *Re Greaves*, 2 Eq. Rep. 516.

(*u*) *Hartland* v. *Atcherley*, 7 Beav. 53.

(*x*) *Than* v. *Smith*, 27 W. R. 617.

unsound mind resides, or under whose care he or she is, unless the court or a judge otherwise orders (*y*).

Practice where a new committee appointed *pendente lite*.

If a committee, co-defendant of the lunatic, is discharged or dies *pendente lite*, the procedure to make the new committee a party would seem to be the same with that already stated in regard to the death of a committee co-plaintiff (*z*). The old practice was to obtain an order to carry on and prosecute the suit as against the new committee, on motion of course, at the Rolls (*a*).

Lunatic not so found.

(B.) Where a lunatic has not been so found by inquisition, he defends an action or responds to a petition or summons by guardian appointed for that purpose (*b*). Persons who, though not absolutely lunatic, are of weak intellect, or who by age and infirmity have been reduced to a second infancy, may, presumably, defend by guardian also (*c*).

It is not necessary for the plaintiff in every case to apply for a guardian *ad litem*, but only when he denies that the defendant should appear and defend the action. When no relief is asked against a defendant the application need not be made (*d*).

Guardian *ad litem*.

Before a guardian *ad litem* can be appointed, the lunatic must have been served with the writ or petition (*e*). This is effected by service on the person with whom the person of unsound mind resides, or under whose care he or she is, unless the court or judge otherwise orders (*f*).

Service on lunatic.

This brief rule has set at rest the questions which, to

(*y*) R. S. C. 1883, Ord. XIII. r. 1.

(*z*) Ante, p. 323.

(*a*) 1 Dan. Ch. Pr. 182; 15 & 16 Vict. c. 86, s. 52; and see *Lyon* v. *Mercer*, 1 S. & S. 356; *Bryan* v. *Twigg*, 3 Eq. Rep. 62; *Rudd* v. *Speare*, 3 De G. & S. 374.

(*b*) R. S. C., Ord. XVI. r. 17.

(*c*) 1 Dan. Ch. Pr. 182; Lord Redesdale, 104; *Bonfield* v. *Grant*, 11 W. R. 275; and for persons of weak intellect, see Lord Redesdale, 103; *Newman* v. *Selfe*, 11 W. R. 764; but also *Steel* v. *Cobb*, 11 W. R. 298; and for the case of a petition, *Re Greaves*, 2 Eq. Rep. 516.

(*d*) R. S. C., Ord. XIII. r. 1, *Taylor* v. *Pede*, 29 W. R. 627; as to writ of sequestration, see *Robinson* v. *Galland*, W. N. 1889, p. 108.

(*e*) 1 Dan. Ch. Pr. 183.

(*f*) R. S. C. 1883, Ord. XIII. r. 1. See n. (*u*), ante, p. 331.

judge from the number of the cases, were constantly arising as well at law as in equity, whether a lunatic had been properly served (*g*).

Guardian when appointed.

Where it is intended to apply on behalf of the lunatic for the appointment of a guardian, an appearance must first be entered on his behalf, but no further step must be taken for him until the order appointing a guardian has been obtained (*h*).

Appointment of guardian on application of lunatic,

Where the writ, petition or summons has been served and an appearance has been entered, a guardian is appointed on application to the court or a judge in the name of the person for whom the guardian is desired (*i*), which should be supported by affidavits proving the mental incapacity of the defendant (*k*), the fitness of the proposed guardian, and the fact that he has no adverse interest (*l*).

on application of plaintiff.

Where no appearance has been entered for the lunatic,

(*g*) As to the old practice at common law, see *Blake* v. *Cooper*, 11 C. B. 680; *Pigeon* v. *Bruce*, 8 Taunt. 410; *Humphreys* v. *Griffiths*, 6 M. & W. 89; *Bransom* v. *Moss*, 6 M. & W. 420; *S. C.* s. n. *Rawson* v. *Moss*, 8 Dowl. P. C. 412; *Banfield* v. *Darell*, 2 D. & L. 4; *Spiller* v. *Benson*, 13 L. J., N. S., Exch. 114; cf. *Starkie* v. *Skilbeck*, 6 Dowl. 52; *S. C.*, 2 Jur. 255; *Jones* v. *Evans*, 8 Dowl. 425; *Anon.*, 6 Jur. 37; *Limbert* v. *Hayward*, 13 M. & W. 480. For the procedure under 15 & 16 Vict. c. 76, see *Holmes* v. *Service*, 15 C. B. 293; *Williamson* v. *Maggs*, 28 L. J., N. S., Ex. 5; *Ridgway* v. *Cannon*, 23 L. T. 143; *Re Child*, 15 C. B. 238; *Denison* v. *Harding*, 15 W. R. 346; *Kimberley* v. *Alleyne*, 9 Jur., N. S. 650. For service in ejectment see *Doe* d. *Gibbard* v. *Roe*, 9 Dowl. 844; *Doe* d. *Roe* v. *Wright*, Barnes, 190; *Doe* d. *Aylesbury* v. *Roe*, 2 Chitty, 183; *Doe* d. *Brown* v. *Roe*, 6 Dowl. 270; *Doe* d.—— v. *Roe*, 7 Jur. 725. As to the old practice in equity see 1 Dan. Ch. Pr. 368; Morgan's Ch. Acts and Orders, 418; *Elliston* v. *Sheldrake*, 2 L. T., N. S. 48; *Morgan* v. *Jones*, 4 W. R. 381; *Raine* v. *Wilson*, 29 L. T., N. S. 51; *Anon.*, 2 Jur., N. S. 324; *Biddulph* v. *Lord Camoys*, 7 Beav. 580.

(*h*) 1 Dan. Ch. Pr. 183; cf. *Lushington* v. *Sewell*, 6 Mad. 28.

(*i*) 1 Dan. Ch. Pr. 182, and for a petition, *Re Greaves*, 2 Eq. Rep. 516; *In re Dawson*, 41 Ch. D. 415.

(*k*) *Simmons* v. *Bates*, 20 L. T. 272; cf. *Watson* v. *Knilans*, 22 W. R. 639.

(*l*) *Piddocke* v. *Smith*, 9 Ha. 395; cf. *Foster* v. *Cautley*, 10 Ha. App. 24; *Dobbin* v. *Billing*, I. R., 6 Eq. 623.

the plaintiff must himself apply for an order (*m*), but without entering an appearance for him. The entry of an appearance by the plaintiff for the lunatic is an irregularity, and is not justified even where the capacity of the defendant is strongly suspected, and he insists on instructing as solicitor a co-defendant whose interests are on the face of the bill adverse to his own (*n*).

Where the plaintiff applies, he may do so either by summons or motion. Notice of motion for the appointment of a guardian *ad litem* should be served in the same manner as in the case of default of appearance to a writ of summons (*o*). At the hearing the court or judge will require to be satisfied that the bill, writ or petition (as the case may be) has been duly served, and that the notice of the application was served after the expiration of the time for appearing and at least six clear days before the day named in the notice for hearing the application (*p*). In one case Lord Selborne, C., said, that though it was unnecessary then to decide the point, he was disposed to think that even if a disinterested friend other than the relations of the alleged lunatic intervened, it would be necessary to prove service of the bill (*q*). The court or judge has, however, a discretion to dispense with service of the notice (*r*).

Jurisdiction to appoint guardian.

The order for an appointment of a guardian *ad litem* is made by virtue of the jurisdiction in chancery, and not in lunacy (*s*).

Appointment of guardian improperly obtained.

If the fact of the infirmity is disputed, or the order has been irregularly obtained, whether by the plaintiff or

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(*m*) R. S. C. 1883, Ord. XIII. r. 1. The practice is the same in actions commenced by originating summons. *Osbaldiston* v. *Crowther*, 1 Sm. & G. App. 12; as to application by co-defendant, see *In re Dawson*, 41 Ch. D. 415.

(*n*) *Leese* v. *Knight*, 8 Jur., N. S. 1006.

(*o*) *In re Pepper*, 32 W. R. 765; *In re Dawson*, 41 Ch. D. 415.

(*p*) R. S. C. 1883, Ord. XIII. r. 1.

(*q*) *Camps* v. *Marshall*, L. R., 8 Ch. 462, 464.

(*r*) R. S. C. 1883, Ord. XIII. r. 1.

(*s*) *Pidcock* v. *Boultbee*, 2 De. G., M. & G. 898.

defendant, the other party may move on notice to discharge the order (*t*); and the court will, under proper circumstances, direct an inquiry whether the defendant is competent to act for himself or not (*u*).

Recovery of lunatic.

The alleged lunatic for whom a guardian *ad litem* has been appointed may, on his recovery, apply by motion on notice to the plaintiff and to the guardian, that the order assigning the guardian may be discharged (*x*). In one case (*y*), where delay had occurred in making the application, the defendant was ordered to pay his guardian's costs. The motion was, however, granted, and the applicant was ordered to be at liberty to add the costs to his own costs of suit.

No step beyond appearance before guardian appointed.

Where a defendant is undeniably lunatic, although not so found, no step can be taken on his behalf beyond that of entering an appearance in his name, until the order appointing a guardian has been obtained (*z*).

Supervening insanity of defendant, or death of guardian.

Should a defendant become insane, or the guardian of a lunatic or person of unsound mind die, during the continuance of the suit, a guardian or fresh guardian must be appointed in a similar manner to that in which the original guardian was appointed (*a*). It appears, moreover, that besides the proof of the death of the former guardian, and the fitness and consent of the proposed guardian, evidence must again be produced of the continued incapacity of the defendant, in form similar to that required on the original application (*b*).

Probate suit.

In a probate suit the citation of a party who was a lunatic

(*t*) *Lee* v. *Ryder*, 6 Mad. 294; Seton, 1251; *Camps* v. *Marshall*, 8 Ch. 462.

(*u*) *Lee* v. *Ryder*, *ubi sup.*

(*x*) 1 Dan. Ch. Pr. 184; *Frampton* v. *Webb*, 11 W. R. 1018.

(*y*) *Frampton* v. *Webb*, *ubi sup.*

(*z*) *Lushington* v. *Sewell*, 6 Mad. 28.

(*a*) *Needham* v. *Smith*, 6 Beav. 130; 1 Dan. Ch. Pr. 183. It seems that a guardian *ad litem* may be appointed on the plaintiff's motion even for a lunatic so found where the committee by whom he had defended has died and a new committee has not been appointed. *Snook* v. *Watts*, M. R., 20 Dec., 1860, B. 2654; Seton, 1251.

(*b*) Ib.

confined in a foreign asylum was dispensed with, the lunatic's interest being sufficiently protected by the parties before the court (*c*).

Who will be appointed Guardian ad litem.

Where plaintiff applies.

On an application by the plaintiff, it is usual to appoint the official solicitor to be the guardian (*d*) ; not from any preference of the court for that appointment, which, indeed, is apparently only made when no other or more proper person will undertake the defence. The court will look in the first instance for some natural protector (*e*). Thus, a brother co-defendant (*f*) and a son co-defendant (*g*) have been appointed, though the motion proceeded from the plaintiff.

Where lunatic applies.

Similarly, where the application is made on behalf of the family of the lunatic, a co-defendant who has no adverse interest may be appointed (*h*) ; and, in fact, any person in whose appointment the family of the incapacitated person may concur, provided, of course, that he can produce a satisfactory affidavit as to his fitness (*i*). Notwithstanding a doubt on the part of the registrar in *Charlton* v. *West* (*k*), it was not the practice to appoint the solicitor to the suitors' fund where the application proceeded from the friends of the lunatic defendant (*l*) ; though, no doubt, he might have been appointed in the last resort.

Who will be appointed guardian.

(*c*) *Ward* v. *Huckle*, 12 P. D. 110.

(*d*) 1 Dan. Ch. Pr. 183 ; *M'Keverakin* v. *Cort*, 7 Beav. 347 ; *Moore* v. *Platel*, 7 Beav. 583 ; *Biddulph* v. *Lord Camoys*, 9 Beav. 548 ; *Charlton* v. *West*, 3 De G., F. & J. 156 ; and cf. *Thomas* v. *Thomas*, 7 Beav. 47 ; *Needham* v. *Smith*, 6 Beav. 130 ; *Piddocke* v. *Smith*, 15 Jur. 1120 ; *Brooks* v. *Jobling*, 2 Hare, 155 ; *In re Pepper*, 32 W. R. 765.

(*e*) *Moore* v. *Platel*, 7 Beav. 583.

(*f*) *Bonfield* v. *Grant*, 11 W. R. 275.

(*g*) *Newman* v. *Selfe*, 11 W. R. 764.

(*h*) 1 Dan. Ch. Pr. 173, 182.

(*i*) Ib. ; and conf. 9 Hare, App. 27.

(*k*) 3 De G., F. & J. 156.

(*l*) Ib., per Knight Bruce, L. J.

In any case, the plaintiff (*m*), the plaintiff's solicitor (*n*), a married woman (*o*), and a person resident out of the jurisdiction (*p*), are unfit candidates for the office.

Costs of committee or guardian.

In giving the committee leave to defend an action or appointing a guardian *ad litem*, the court will not make any prospective order as to the costs to be incurred therein, unless, indeed, the guardian appointed be the official solicitor, in which case the plaintiff is usually directed to pay them and add them to his own (*q*).

Defence of a lunatic by his committee or guardian.

The defence is expressed to be made by his committee as his guardian, or the person appointed to be his guardian by the court (*r*).

How far it may be read against him.

The defence of a lunatic put in by his committee may be read against him; that of a lunatic not so found, put in by his guardian, apparently cannot (*s*). The latter proposition was affirmed, as to superannuated and imbecile defendants, after some hesitation (*t*).

Leave of the court to be obtained for special steps.

The committee or guardian, before he consents to any departure from the ordinary course of procedure, should first obtain the sanction of the court or judge in chambers (*u*), and the committee should also obtain that of the judge in lunacy.

(*m*) 1 Dan. Ch. Pr. 173.

(*n*) *Biddulph* v. *Lord Camoys*, 9 Beav. 548.

(*o*) *Anon.*, 18 Jur. 770.

(*p*) *Lady Hartland* v. *Atcherley*, 7 Beav. 53.

(*q*) *Harris* v. *Hamlyn*, 3 De G. & S. 470; *Fraser* v. *Thompson*, 4 De G. & J. 659; *Robinson* v. *Aston*, 9 Jur. 224.

(*r*) Ld. Red. 315; 1 Dan. Ch. Pr. 184. A guardian formerly only swore to his belief in the truth of the answer. The order appointing him was produced at the time of swearing, and referred to in the jurat. Where the infirmity is the result of ill-health, time is allowed, instead of allowing reference by guardian. *Willyams* v. *Hodge*, 1 Mac. & G. 516; *Patrick* v. *Andrews*, 22 L. J., N. S., Ch. 240; *Steel* v. *Cobb*, 11 W. R. 298; *Newman* v. *Selfe*, Id. 764.

(*s*) *Leving* v. *Caverly*, Prec. Ch. 229; *Micklethwaite* v. *Atkinson*, 1 Coll. 173; *Percival* v. *Caney*, 4 De G. & S. 610.

(*t*) *Wilds* v. *Davis*, 4 Jur. 715; *Freeman* v. *Grady*, 8 Ir. Eq. Rep. 137; *Crawford* v. *Kernaghan*, 1 Dr. & Wal. 195, where the bill was taken *pro confesso* against the guardian.

(*u*) 1 Dan. Ch. Pr. 184.

Order against lunatic, how enforced.

Where a decree has been obtained in an action against a lunatic so found and the committee of his estate, the proper order is that the committee shall apply to the judge in lunacy for leave to deal with the lunatic's property in such a manner as to satisfy the declaration of the action.

If the committee fail to comply with this order, an application may be made in lunacy for an order against the lunatic and the committee; no other court has jurisdiction to order the committee to deal with the estate of the lunatic (*x*).

Action to establish equity to settlement.

So, Where an action has been instituted against the lunatic to establish his wife's equity to a settlement, the committee should carry in proposals for the settlement in the master's office (*y*); but the wife is not bound by the approval of the settlement by the master, nor need she apparently intervene in the lunacy proceedings (*z*).

Defendant becoming lunatic after decree.

In a case under the old practice, where a defendant had become lunatic after decree, the Court of Chancery, at the expiration of six months from the date of the decree, allowed it to be enrolled, on notice to the defendant's solicitor on the record (*a*).

Sect. 3.—*Miscellaneous Points in Pleading occasioned by the Insanity of Parties to Actions.*

Action by attorney-general.

1. Where an action is commenced by the attorney-general on behalf or on relation of an insane person, not merely must the insane person be a party, but there must, it seems, also be a co-plaintiff, to be responsible to the defendant for the costs of the action (*b*). Under the old practice, where a lunatic had been made relator, the court,

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(*x*) *Ames* v. *Parkinson*, 2 Phill. 388.

(*y*) *Baldwin* v. *Baldwin*, 5 De G. & S. 319.

(*z*) Ib.

(*a*) *Smith* v. *Whitmore*, 11 L. T., N. S. 507.

(*b*) 1 Dan. Ch. Pr. 65.

on a motion that a responsible relator should be appointed, directed that all further proceedings in the cause should be suspended until a proper person should be named as relator in his stead (*c*).

Administration suit. Proof.

2. In an action for administration of an estate, where a creditor of the estate is insane, an order has been made that the chief clerk be at liberty to receive any evidence of the debt that may be satisfactory to him (*d*).

Breach of promise of marriage.

3. The previous insanity of one of the parties is no answer to an action for breach of promise of marriage (*e*); though the actual present insanity of such party would be (*f*).

Defence to action on contract.

4. In an action on a contract, where the lunacy of the defendant was raised as the defence (*g*), it might under the old practice have been given in evidence under the general issue (*h*); though it has been held more than once in actions on negotiable paper, that the defendant could not prove his intoxication or insanity under a plea denying that he made the note or endorsed the bill declared upon, but that these defences must have been embodied in special pleas (*i*).

Under the new system of pleading it would certainly be proper to include the circumstances under which the contract was entered into in the statement of defence, where lunacy or intoxication are relied on (*k*); and the allegation should go to the full disability (*l*).

(*c*) *Att.-Gen.* v. *Tyler*, 2 Eden, 230; Ld. Rec. 29, n. (*l*).

(*d*) *Herbert* v. *Matthews*, 19 Ves. 611.

(*e*) *Baker* v. *Cartwright*, 30 L. J., N. S., C. P. 364.

(*f*) *Hall* v. *Wright*, E. B. & E. 746.

(*g*) As to the cases in which this defence is admissible, vide ante, pp. 242 *et seq.*

(*h*) 1 Taylor on Evidence, 303; *Tarbuck* v. *Bispham*, 2 M. & W. 2; *Yates* v. *Boen*, 2 Str. 1104; *Faulder* v. *Silk*, 3 Camp. 126; *Cole* v. *Robins*, Bull. N. P. 172 a; *Pitt* v. *Smith*, 3 Camp. 33; *Cooke* v. *Clayworth*, 18 Ves. 16.

(*i*) *Gore* v. *Gibson*, 13 M. & W. 623; *Harrison* v. *Richardson*, 1 M. & Rob. 504; *Alcock* v. *Alcock*, 3 M. & Gr. 268.

(*k*) R. S. C. 1883, Ord. XIX. rr. 15, 22.

(*l*) *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

Action for partition.

5. Action for partition. A next friend of a lunatic not so found may institute an action on behalf of the lunatic for the partition or recovery of land of which the lunatic is entitled to an undivided share (*m*).

Lunatic plaintiff.

Lunatic defendant.

A lunatic may also be defendant to an action for partition (*n*).

Form of order.

The proper form of order in such a case is, after allotting portions in severalty and directing conveyances by the other parties, to declare the lunatic a trustee for the other parties of the portions allotted to them (*o*). The next step is to make an application to the judge in lunacy. Then, if the lunatic has been so found, two courses are open. The court may either make an order in the matter of the Lunacy Act, directing the committee to convey (*p*), or it may make a vesting order directly (*q*). In the case of a lunatic not so found, the latter course is alone open. Where it is followed, the vesting order should not be drawn up until the conveyances by the other parties have been executed and produced to the registrar (*r*).

Action to perpetuate testimony;

6. Action to perpetuate testimony as to the state of mind of an alleged lunatic when he made or executed a given will or deed.

as to a will,

Whether such an action will lie in the case of a will is not quite certain. *Primâ facie* it would not, as there is no one actually interested for or against the will (*s*); but in

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(*m*) *Halfhide* v. *Robinson*, L. R., 9 Ch. 373; 31 & 32 Vict. c. 40, s. 4; 39 & 40 Vict. c. 17, s. 6; *Watt* v. *Leach*, 26 W. R. 475; *Porter* v. *Porter*, 37 Ch. D. 420; *Waterhouse* v. *Worsnop*, 59 L. T., N. S. 140.

(*n*) *Hollingworth* v. *Sidebottom*, 8 Sim. 620.

(*o*) *Re Bloomar*, 2 De G. & J. 88; *Re Molyneux*, 10 W. R. 512; *Moorehead* v. *Moorehead*, I. R., 2 Eq. 492.

(*p*) *Re Bloomar*, *ubi sup.*

(*q*) *Re Molyneux*, *ubi sup.*; *Cowper* v. *Harmer*, 57 L. J., N. S., Ch. 460.

(*r*) Ib.

(*s*) *Sackville* v. *Ayleworth*, 1 Vern. 105; and cf. *Campbell* v. *Dalhousie*, L. R., 1 Sc. App. 462; *Dursley* v. *Fitzhardinge*, 6 Ves. 251, 260; *Belfast* v. *Chichester*, 2 Jac. & W. 439; *Smith* v. *Att.-Gen.*, cit. ap. 1 Vern. 105; *Allan* v. *Allan*, 15 Ves. 130.

one case the lords justices sitting in lunacy allowed a bill to be filed for the purpose, at the cost of the lunatic's estate, though they expressly abstained from deciding the abstract point (*t*).

Where a deed is in question, it seems that the proper course is rather to commence an action to set it aside. The committee will not, even where the lunatic is so found, necessarily be the person to institute proceedings (*u*). Leave may be given to some person more interested in the issue to do so, as the next friend of the lunatic, making the committee a formal defendant (*v*). This leave may be given without requiring the next friend to give security for costs (*x*). as to a deed.

When the legitimacy of a child of the lunatic is in question the Court will make a settlement of some of the lunatic's property on the children so that the legitimate children may be able to bring an action to perpetuate testimony on the question of the rights of the alleged illegitimate child to participate (*y*).

7. A demurrer would not lie to an action for specific performance of an agreement to buy or sell land on the ground that the present mental incapacity of a necessary party to the conveyance to join therein, or to concur in a parol variation of the contract, appears on the face of the pleadings (*z*). Specific performance of agreement to sell land.

8. No special case in an action to which a person of unsound mind not so found by inquisition is a party, can be set down for argument without the leave of the court or judge (*a*). The application must be supported by sufficient evidence that the statements contained in the special case, so far as they affect the interest of the person of unsound mind, are true (*b*). A copy of the order made Special case.

(*t*) *Re Tayleur*, L. R., 6 Ch. 416.

(*u*) *Re Gordon*, L. R., 10 Ch. 192.

(*v*) Ib.

(*x*) Ib.

(*y*) *In re Stoer*, 9 P. D. 120.

(*z*) *Duke of Beaufort* v. *Glynn*, 25 L. T. 171; and on appeal, 3 W. R. 502; and see p. 259, ante.

(*a*) R. S. C. 1883, Ord. XXXIV, r. 4.

(*b*) Ib.

on the application should be produced to the proper officer on entering the special case for argument (*c*).

Owner of first estate of inheritance a lunatic.

9. It is a general rule that the owner of the first estate of inheritance is sufficient to support, in an action affecting the subject of the estate, not only his own estate, but that of everybody in remainder behind him. Therefore, generally, where a tenant in tail is before the court, all subsequent remaindermen are considered unnecessary parties (*d*).

Where, however, the owner of the first estate of inheritance is a lunatic, the owner of the next estate of inheritance is a proper party (*e*).

Husband of feme covert defendant a lunatic.

10. Where the husband of a married woman, defendant in a suit, was mentally incompetent to answer, she might even under the old practice on motion of course or petition of course at the Rolls obtain an order to defend separately (*f*). Under the Judicature Rules, married women may sue or be sued as provided by the Married Women's Property Act, 1882 (*g*).

Habeas Corpus.

11. The ordinary method of obtaining the production of an insane person, wheresoever detained, is by writ of *habeas corpus* directed to the person or persons having him under their charge or custody. Thus, a *habeas corpus* may issue at the instance of the committee of the person after his appointment to obtain possession of the person of a lunatic found so by inquisition, although a summary order of the lord chancellor may be obtained for the same purpose (*i*). And, doubtless, where the production of the lunatic is re-

When issued.

(*c*) R. S. C. 1883, Ord. XXXIV. r. 5.

(*d*) *Reynoldson* v. *Perkins*, Amb. 564; *Finch* v. *Finch*, 2 Ves. sen. 492.

(*e*) *Singleton* v. *Hopkins*, 25 L. J., N. S., Ch. 50; 1 Dan. Ch. Pr. 231.

(*f*) *Estcourt* v. *Ewington*, 9 Sim. 252; 1 Dan. Ch. Pr., *Nichols* v. *Ward*, 2 Mac. & G. 143, n.; *Bray* v. *Akers*, 15 Sim. 610.

(*g*) R. S. C. 1883, Ord. XVI. r. 16.

(*i*) *Ex parte Cranmer*, 12 Ves. 445.

quired for the inquisition or traverse, although the application may be made to the master for a summons to produce, a *habeas corpus* might be granted (*k*). Habeas corpus.

Similarly, in case of alleged illegal detention a *habeas corpus* is usually applied for (*l*).

Where, in answer to such an application, it appears by the affidavit of a medical man, or some other competent person, that the party is actually a lunatic, and in such a state of mind as from consideration for the safety of himself or others not to be fit to be removed, the court will sometimes enlarge the time for the return of the writ (*m*), and a previous inspection by a medical man appointed by the court is in such a case sometimes directed (*n*). Where lunatic dangerous.

If the party confined as a lunatic, upon being brought into court appears to be free from insanity, he ought to be set at liberty by the order of the court (*o*). So, too, if, although perhaps insane, his insanity is not dangerous to himself or others, and his detention is not justified by precise statutory enactment, he must be set at liberty (*p*). But the court has, independently of statutory enactment, power to remand a person whose state is such as to render him dangerous to himself or others (*q*). Power of court to discharge lunatic; and to remand.

Where the person has been received in an institution for lunatics upon a proper order, accompanied with the required medical certificates or certificate, the proprietor or superintendent, or other person by statute authorized to receive or take charge of the lunatic, his assistant or servant may, in the return to the *habeas corpus*, plead the Powers of Lunacy Act may be pleaded on the return.

(*k*) *Re Turner*, cit. ap. Shelf. on Lun., p. 151.

(*l*) Conf. under the Irish Act, 8 & 9 Vict. c. 107, the case of *R.* v. *Riall*, 11 Ir. R., Com. L. 279; 2 L. T., N. S. 122.

(*m*) *R.* v. *Clarke*, 3 Burr. 1362; and cases cited in following note.

(*n*) *R.* v. *Turlington*, 2 Burr. 1115; *R.* v. *Wright*, Id. 1099; *R.* v. *Kelly*, cit. ap. Shelf. on Lun., p. 515; *R.* v. *Harty*, cit. ap. Sm. & B. 82; *Ex parte Carpenter*, Ib. 81; cf. *Reg.* v. *Riall*, 11 Ir. R., Com. Law, 279.

(*o*) *R.* v. *Turlington*, 2 Burr. 1115.

(*p*) *R.* v. *Pinder*, 24 L. J., N. S., Q. B. 148.

(*q*) *Re Shuttleworth*, 9 Q. B. 651.

Habeas corpus.

order and certificates or certificate, which will be a complete justification for the detention (*r*). The return to the *habeas corpus* will not be looked at in the same way as a special plea: if it appears upon the face of it that the party is properly in custody, that is sufficient (*s*). Nor is it necessary to aver that the person is a lunatic (*t*).

Habeas corpus ad justificandum;

Again, a lunatic's bail may have a *habeas corpus ad justificandum* to produce their principal on affidavit that he is not dangerous (*u*); and the time to produce him will

ad testificandum;

not be enlarged, except on affidavit that he is so (*x*). A *habeas corpus ad testificandum* may also be obtained in a proper case (*y*).

Writ how enforced.

If the party to whom the *habeas corpus* is directed omit to make any return, the court will issue an attachment on notice without a previous rule to return the writ (*z*).

Feigned return directed in a special case.

In a case where a husband applied for a *habeas corpus* directed to his wife's friends for her production, and it was alleged on their behalf that he had decoyed her away and married her while incapable of understanding the nature of the marriage contract, the court ultimately directed a feigned return to the writ that this lady was not the wife of the applicant, to afford him the opportunity of traversing it and obtaining the verdict of a jury on the question of sanity (*a*).

(*r*) 53 Vict. c. 5, ss. 35, 85, 330.

(*s*) Per Patteson, J., in *Re Fell*, 15 L. J., N. S., M. C. 25.

(*t*) *Norris* v. *Seed*, 3 Exch. R. 782.

(*u*) *Pillop* v. *Sexton*, 3 Bos. & P. 550; *Fennell* v. *Tait*, 5 Tyr. 218.

(*x*) *Cock* v. *Bell*, 13 East, 355; *Anderson's Bail*, 2 Chitty, R. 104; and conf. *Cavenagh* v. *Collett*, 4 Barn. & Ald. 279.

(*y*) Post, p. 381.

(*z*) *R.* v. *Wright*, 2 Str. 915; but not an attachment *nisi*. See the R. S. C. 1883, Ord. XLIV. r. 2; Ord. LII. r. 2.

(*a*) *R.* v. *Kelly*, cit. ap. Shelf. on Lun., p. 515.

CHAPTER X.

SAVING PROVISOES IN FAVOUR OF LUNATICS IN REGARD TO PRESCRIPTION AND LIMITATION OF ACTIONS.

Introductory.

EVERY law which makes time determinant of right is based expressly or implicitly on the principle of acquiescence; now a lunatic cannot strictly acquiesce, and, regarding the matter in this light alone, it would seem that time ought not to create rights against them, or to bar their rights at all. On the other hand, the advantage derived by the community from the general rule is so important that it has, in English law at least, often been found impossible to exclude its operation entirely, even in the case of the insane. Accordingly a compromise has usually been resorted to, by which the period of time limited for the operation of a protest against a right is extended for the benefit of persons suffering under incapacity.

Prescription.

By the "Act for Shortening the Time of Prescription in certain Cases" (*a*), which deals with rights of common and other profits *à prendre*, ways, easements and watercourses and light, it is provided that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned is (among other things) an idiot, or *non compos mentis*, shall be excluded in the computation of the periods of prescription assigned in the act, except only in cases where the right or claim is thereby declared to be absolute and indefeasible (*b*). The cases where the right is declared by the statute to be absolute and indefeasible are as follows: By the 1st section, where the

Cases in which the right acquired by lapse of time is indefeasible.

(*a*) 2 & 3 Will. 4, c. 71; see Shelford's Real Property Statutes, pp. 1 *et seq.*; Gale on Easements, ed. 6, pp. 162, *et seq.*

(*b*) 2 & 3 Will. 4, c. 71, s. 7.

right, profit or benefit has been taken as required for the full period of sixty years; by the 2nd section, where any way, easement or watercourse, or the use of any water, has been enjoyed, as therein mentioned, for the full period of forty years; by the 3rd section, where the light has been enjoyed for the full period of twenty years: unless in any of these cases respectively it appears that the enjoyment is by virtue of some covenant or agreement expressly made or given for that purpose by deed or writing. In all and every of these cases an absolute title is conferred, even against parties under disabilities, but an enjoyment for the shorter periods of prescription assigned in this act will be of no avail against them (*c*).

Limitation of actions relating to real property.

By the acts for the limitation of actions and suits relating to real property (*d*), so far as they deal with the recovery of land or rent (*e*), it is enacted that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any rent has accrued (*f*), the person shall be under any of the disabilities thereinafter mentioned, and which include idiocy, lunacy and unsoundness of mind, such person or the person claiming through him may, notwithstanding the period of twelve or six years thereinbefore limited has expired, make an entry or distress, or bring an action to recover such land or rent (*g*), at any time within six years next after the time at which the person to whom such right has first accrued ceases to be under any such disability or dies (whichever first happens) (*h*).

Time at which

The clause operates only where the party intended to be

(*c*) *Wright* v. *Williams*, Tyr. & Gr. 392.

(*d*) 3 & 4 Will. 4, c. 27; and 37 & 38 Vict. c. 57; see Hayes on Conveyancing, vol. i., pp. 222 *et seq.*; Shelford's Real Property Statutes, pp. 131 *et seq.*

(*e*) See sect. 1 of 3 & 4 Will. 4, c. 27, for the interpretation of these terms.

(*f*) As to when this time is, see sects. 3—9 of 3 & 4 Wm. 4, c. 27, and s. 2 of 37 & 38 Vict. c. 57.

(*g*) Sect. 3 of 37 & 38 Vict. c. 57.

(*h*) Sect. 3 of 37 & 38 Vict. c. 57; cf. 21 Jac. 1, c. 16, s. 2; and *Doe* v. *Jones*, 4 T. R. 310; *Sturt* v. *Mellish*, 2 Atk. 610—614.

protected is under disability at the time when the right to make the distress or bring the action first accrued; and the incongruities resulting from this literal construction of the language will not prevent its being adhered to (*i*). the lunacy must have existed.

Successive disabilities in the same person extend the period within which the remedy may be enforced to six years after the removal of the last disability (*k*); successive disabilities in different people have no such effect (*l*). Where a man, being both beyond the seas and insane, returned to England and left it again, the disability of being beyond the seas was held effectually determined (*m*). Neither the continuance of a single disability nor a succession of disabilities in the same person will serve to keep the remedy open for more than thirty years next after the time at which the right first accrued (*n*). Successive disabilities. Absolute limit.

The disability of one of two or more parceners will not preserve the title of the other or others after the lapse of the twelve years (*o*). Parceners.

In case of fraud, the right accrues when the fraud is or might reasonably be discovered (*p*). The obtaining of conveyances from a lunatic is fraud within this provision (*q*). Fraud.

So far as the act for the limitation of actions and suits relating to real property assigns a limit of time for the recovery of land or rent by the mortgagor from the mortgagee, there is no saving for disabilities of any kind (*r*); nor is it clear that the 16th section of the act of Redemption. Foreclosure.

(*i*) *Owen* v. *De Beauvoir*, 16 M. & W. 567, 568; and conf. *De Beauvoir* v. *Owen*, 5 Exch. 166.

(*k*) *Borrows* v. *Ellison*, L. R., 6 Exch. 128; and conf. *Supple* v. *Raymond*, 1 Hayes' Ir. Rep. 6.

(*l*) 3 & 4 Will. 4, c. 27, s. 18; 37 & 38 Vict. c. 57, s. 9, and for its retrospective force, conf. *Devine* v. *Holloway*, 9 W. R. 642.

(*m*) *Sturt* v. *Mellish*, 2 Atk. 614.

(*n*) 3 & 4 Will. 4, c. 27, s. 17; 37 & 38 Vict. c. 57, s. 5.

(*o*) *Roe* v. *Rowlston*, 2 Taunt. 441.

(*p*) 3 & 4 Will. 4, c. 27, s. 26.

(*q*) *Lewis* v. *Thomas*, 3 Ha. 26.

(*r*) 37 & 38 Vict. c. 57, s. 7; 3 & 4 Will. 4, c. 27, s. 28. An account delivered within twenty years by the receiver or manager of the mortgagee's estate, the mortgagee being a lunatic, was held not to take the case out of the statute; *Barron* v. *Martin*, Coop. 189.

3 & 4 Wm. 4, c. 27, can be read with the section of the amending act by which the time within which the mortgagee may recover lands or rent from the mortgagor is limited and determined (*s*).

Church property. Advowsons.

Neither is there in 3 & 4 Wm. 4, c. 27, any saving for disabilities affecting the sections of the principal act which relate to church property or advowsons (*t*).

Money charged on real estate and legacies.

The period limited by the statute for the recovery of any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of land or rent, or any legacy, is twelve years next after the present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same (*u*); and in 23 & 24 Vict. c. 38, s. 13, which extends the section to cases of claims to estates of intestates, the same words are repeated.

Disability.

This language would clearly prevent time running against a lunatic who had no committee; probably it would be construed similarly in the case of a lunatic so found (*x*).

Critical time.

The disability must exist at the time that the present right to receive accrues: a supervening disability will be inoperative to extend the time.

In *Farran* v. *Beresford* (*y*), Tindal, C. J., interpreted the words to mean "an immediate right without waiting for the happening of any future event." This it is submitted is clearly the proper meaning. It is the period when *dies venit*, not that at which *dies cedit*.

Lunacy of executor in case of legacies.

The lunacy of an executor who has proved the will is no bar (*z*); but where the fund has been carried to an account in the lunacy which recognizes the claim, it is, at least as far as the capital goes, taken out of the statute (*a*).

(*s*) 7 Will. 4 & 1 Vict. c. 28, s. 1. See now 37 & 38 Vict. c. 57, ss. 3, 9.

(*t*) 3 & 4 Will. 4, c. 27, ss. 29—33.

(*u*) 37 & 38 Vict. c. 57, s. 8.

(*x*) See *Binns* v. *Nichols*, L. R., 2 Eq., 256, 260, per Wood, V.-C.

(*y*) 10 Cl. & F. 334.

(*z*) *Boldero* v. *Halpin*, 19 W. R. 320.

(*a*) *Re Walker*, L. R., 7 Ch. 120.

Arrears of dower, &c.

The provisions limiting the recovery of arrears of dower and of rent or interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, and of damages in respect of such arrears of rent or interest to a period of six years, are not subject to any modification on account of the disability of the person entitled (*b*).

Express trust.

Actions, however, for the recovery of mesne rents and profits, or of interest upon a legacy in cases of express trust, are by the statutes of limitation not so strictly limited (*c*); and the fact of the lunacy of the plaintiff, or of some person under whom the plaintiff claims, will tend to rebut the charge of laches.

Specialty debts.

With regard to actions of debt for rent upon an indenture of demise, of covenant, or debt upon any bond or specialty, and actions of debt or *scire facias* upon recognizances, which are limited to twenty years from the causes of action (*d*); with regard to actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of copyhold estates, or for an escape, or for money levied on any *fieri facias*, which are limited to six years from the cause of action (*e*); with regard to actions for penalties, damages or sums of money given to the party grieved by any statute, which are limited to two years from the cause of action (*f*); with regard to actions of trespass *quare clausum fregit*, trespass, detinue, action sur trover and replevin for taking away of goods and cattle, actions upon the case (other than for slander), actions of account (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants), actions of debt grounded upon any lending or contract without specialty, and for arrearages of rent, which are limited to six years from the cause of

Simple contracts and torts.

(*b*) 3 & 4 Will. 4, c. 27, ss. 41, 42; cf. Sugden's V. & P., ed. 14, p. 488.

(*c*) See the cases cited in Shelford's Real Property Statutes, ed. 8, pp. 201 *et seq.*; 236 *et seq.*; 254. See now 51 & 52 Vict. c. 59, s. 8.

(*d*) 3 & 4 Will. 4, c. 42, s. 3; see Shelford's Real Property Statutes, pp. 258 *et seq.*

(*e*) Ibid.

(*f*) Ibid.

action (*g*); with regard to actions of trespass, assault, battery, wounding or imprisonment, which are limited to four years from the cause of action (*h*); and with regard to actions upon the case for words, which are limited to two years after words spoken (*i*); in all these cases the time, in case of the lunacy of the person entitled to bring the action, begins to run from the time when that person becomes of sane memory (*k*).

Saving.

Time when the lunatic dies under disability.

When the person dies without having become of sane memory, it is agreeable to analogy to hold that his executor or administrator may sue, and that time begins to run against such executor or administrator from the death of the lunatic (*l*).

When creditor liable to be restrained in lunacy from suing.

A debt, the recovery of which would have been restrained by the judge in lunacy under any special jurisdiction, *e.g.*, that of the court over its officers, will not be barred, nor will time run against it during the continuance of the liability to restriction (*m*).

Mercantile Law Amendment Act.

There is, apparently, no saving for disabilities in the provisions limiting actions and suits under the Mercantile Law Amendment Act (*n*).

Appeals.

By the Common Law Procedure Act, 1852 (*o*), by the Consolidated Chancery Orders (*p*), by the Standing Orders of the House of Lords (*q*), and by the practice of those courts respectively (*r*), certain limits of time were fixed for proceedings in error, appeals, rehearings and bills of review, and in each case, except that of the chancery courts, savings for disabilities, including lunacy, were expressed (*s*)

(*g*) 21 Jac. 1, c. 16, s. 3.

(*h*) Ibid.

(*i*) Ibid.

(*k*) 3 & 4 Will. 4, c. 42, s. 4; 21 Jac. 1, c. 16, s. 7.

(*l*) *Townshend* v. *Deacon*, 3 Exch. Rep. 706.

(*m*) *Stedman* v. *Hart*, Kay, 607.

(*n*) 19 & 20 Vict. c. 97, s. 9.

(*o*) 15 & 16 Vict. c. 76, s. 146; cf. 22 & 23 Vict. c 21, s. 18.

(*p*) Cons. Ord. XXXI. r. 1.

(*q*) Standing Orders, H. L. CIII. *De Burgh* v. *Clark*, 4 Cl. & F. 562; *Attwood* v. *Small*, 6 Cl. & F. 232, 309; *Beavan* v. *Mornington*, 8 H. L. Cas. 525.

(*r*) 4 Burr. 1963; Shelford's Real Property Statutes, ed. 8, p. 234.

(*s*) 15 & 16 Vict. c. 76, s. 147; 22 & 23 Vict. c. 21, s. 18; Standing Orders, H. L. CIII.

or implied (*t*). In chancery the time might be extended at the discretion of the court (*u*).

The Judicature Act, while abolishing proceedings in error (*x*) and reconstituting the system of appeals to the intermediate appeal court, provides that appeals from interlocutory orders (*y*), orders for winding-up of companies in bankruptcy, &c. (*z*), shall be within twenty-one days, while appeals in other cases are limited to one year (*a*). No saving is included for the case of lunacy, but the time may be extended by special leave, which would probably be granted where an extension of time would have been a matter of course under the old practice (*b*).

By the Appellate Jurisdiction Act, 1876, appeals are subject to such conditions as to the time within which they may be brought as may be imposed by orders of the House of Lords (*c*).

(*t*) *Lytton* v. *Lytton*, 4 Br. C. C. 458.

(*u*) Cons. Ord. XXXI. r. 1.

(*x*) Orders 1875, Ord. LVIII. r. 1. R. S. C. 1883, Ord. LVIII. r. 1.

(*y*) R. S. C. 1883, Ord. LVIII. r. 15.

(*z*) Ibid. r. 9.

(*a*) Ibid. r. 15.

(*b*) See Morgan's Chancery Acts and Orders, ed. 6, p. 514.

(*c*) 39 & 40 Vict. c. 59, s. 11. And see "The Annual Practice" and Supplement.

CHAPTER XI.

OF TESTAMENTARY CAPACITY AND THE WILLS OF LUNATICS.

General principle.

All persons are capable of disposing of their real and personal estate by testament, who have sufficient discretion and their own free will, and who have not been guilty of certain offences (*a*). The part of the qualification that chiefly concerns us is the sufficient discretion of the testator, as to which the following plain rules appear in the books :—

Old rules as to testamentary capacity.

1. The will of an idiot is void (*b*).
2. The will of one deaf and dumb from his nativity, being in presumption of law an idiot, is likewise void (*c*), but the presumption may be rebutted (*d*).
3. The will of a lunatic during his insanity is void (*e*).
4. The will of a lunatic, whether so found by inquisition or not, made during a lucid interval, is valid (*f*).
5. Mental imbecility arising from advanced age or produced permanently or temporarily by excessive drinking or any other cause, may destroy testamentary power (*g*).

(*a*) Cf. Swinb. pt. ii. s. 1 ; 34 & 35 Hen. 8, c. 5, s. 14 ; 1 Jarm. on Wills, 32 *et seq.*

(*b*) Bac. Abr. Idiots (F.) ; Ib. Wills (B.), 12 ; Swinb. pt. ii. s. 4 ; Godolph. pt. i. c. 8, s. 3.

(*c*) Swinb. pt. ii. s. 4, pl. 2; s. 10, pl. 2; Godolph. pt. i. c. 11 ; 4 Burn, E. L. 56—60 ; *In the goods of Ouston*, 2 Sw. & Tr. 461 ; *In the goods of Geale*, 3 Sw. & Tr. 431.

(*d*) Ib. ; et cf. *Dickinson* v. *Blisset*, 1 Dick. 268.

(*e*) Swinb. pt. ii. s. 3, Godolph. pt. i. c. 8, s. 2.

(*f*) Swinb. pt. ii. s. 3, pl. 4 ; Godolph. pt. i. c. 8, s. 2 ; Wentworth, c. 1, pt. 33; *Hall* v. *Warren*, 9 Ves. 610 ; *Rodd* v. *Lewis*, 2 Cas. temp. Lee, 176 ; *Cartwright* v. *Cartwright*, 1 Phill. Eccl. Rep. 100. As to what constitutes a lucid interval, vide ante, p. 18.

(*g*) *Ex parte Cranmer*, 12 Ves. 452 ; *Sherwood* v. *Sanderson*, 19 Ves. 283 ; *Ridgway* v. *Darwin*,

These rules, however, are rarely appealed to in the presence of the more modern test, viz., that to render a will valid the testator must, at its date, have been "of a sound and disposing mind" (*h*), or, as Sir E. Coke expresses it, "have had a disposing memory" (*i*), phrases which were thus amplified and explained by Cockburn, C.J., in the case of *Banks* v. *Goodfellow* (*k*). The disposing mind.

It is essential to the exercise of "the testamentary power that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison the affections, prevent his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of Definition by Cockburn, C.J.

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8 Ves. 66; Swinb. pt. ii. s. 5, pl. 1; Godolph. pt. i. c. 8, s. 4; *Griffiths* v. *Robins*, 3 Madd. 191; *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. R. 211. For the different considerations applicable to lunacy and intoxication in this connection, see *Ayrey* v. *Hill*, 2 Add. 209, 210.

(*h*) 11 Mod. 157; Shep. Touchstone, 413; *Banks* v. *Goodfellow*, L. R., 5 Q. B. 549; *Boughton* v. *Knight*, L. R., 3 P. & D. 64; *Boyce* v. *Rossborough*, 6 H. L. C. 45; *Harwood* v. *Baker*, 3 Moo. P.C. 290; *Combe's case*, Moore's Rep. 759; *Blewitt* v. *Blewitt*, 4 Hagg. 419; *Bennet's case*, cit. 9 Ves. 185; *Dew* v. *Clark*, 1 Add. 279; *Chambers* v. *Queen's Proctor*, 2 Curt. 415; *Fraser* v. *Fraser's Trustees*, 13 Shaw, D. B. & M. 703; *Ditchburn* v. *Fearn*, 6 Jur. 201; *Fullick* v. *Allinson*, 3 Hagg. Eccl. R. 527; *Herbert* v. *Lowndes*, 1 Ch. Rep. 24; Dyer, 27 a in marg.; *Right* v. *Price*, 1 Doug. 241; *Ball* v. *Mannin*, 3 Bl. N. S., 1 *McDiarmid* v. *McDiarmid*, 3 Bl., N. S. 374; *Marsh* v. *Tyrrell*, 2 Hagg. 122; *Ingram* v. *Wyatt*, 1 Hagg 401; *Constable* v. *Tuffnell*, 4 Hagg. 465; *Sefton* v. *Hopwood*, 1 Fost. & F. 578; *Swinfen* v. *Swinfen*, 1 Fost. & F. 584; *Osmond* v. *Fitzroy*, 3 P. Wms. 129; *Keays* v. *M'Donnell*, Ir. R., 6 Eq. 611; *Greenwood* v. *Greenwood*, 3 Curt. App.; *Mountain* v. *Bennet*, 1 Cox, 353; *Goldie* v. *Murray*, 6 Jur. 608; *Smee* v. *Smee*, 5 P. D. 84; *Murfett* v. *Smith*, 12 P. D. 116.

(*i*) *Marquis of Winchester's case*, 6 Rep. 23.

(*k*) L. R., 5 Q. B. 549. See *Jenkins* v. *Morris*, 14 Ch. D. 674; *Murfett* v. *Smith*, 12 P. D. 116.

it, which, if the mind had been sound, would not have been made."

Observations on the above definition.

Hereon observe, that (a.) the sound and disposing mind is not necessarily a perfectly-balanced mind; a man is not incapacitated from making a will though his disposition may be actuated by capricious, frivolous, mean, or even bad motives. "We do not," said Sir J. Hannen, "sit to correct injustice in that respect. Our duty is limited to this; to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will" (*l*).

Caprice.

Weakness.

(b.) It is not necessarily a strong or vigorous mind; mere weakness of understanding is no objection. The *grossum caput*, dull pate or dunce, is not prohibited from making his testament (*m*). Courts cannot measure the size of men's intellects, nor examine into the prudence of their dispositions (*n*).

Comparative degree of soundness.

(c.) At the same time, the standard of testamentary capacity is not lower than the standard of capacity for any other purpose; indeed, in the words of Sir J. Hannen, "If one is at liberty to draw distinctions between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will" (*o*).

Partial insanity.

(d.) Yet partial insanity does not necessarily invalidate a will (*p*); for that purpose it must be shown that the will was the result of or connected with the insanity (*q*); in

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(*l*) *Boughton* v. *Knight*, L. R., 3 P. & M. 64; *Jenkins* v. *Morris*, 14 Ch. D. 674.

(*m*) Swinb. pt. ii. s. 4, pl. 3.

(*n*) *Osmond* v. *Fitzroy*, 3 P. Wms. 129.

(*o*) *Boughton* v. *Knight*, L. R., 3 P. & D. 64, 72; as explained by *Burdett* v. *Thompson*, L. R., 3 P. & M. 72, n. (1); cf. per Eyre, C.B., in *Mountain* v. *Bennet*, 1 Cox, 356; *Harwood* v. *Baker*, 3 Moo. P. C. 290; but see 2 Dow, 283, per Lord Redesdale, and 2 P. Wms. 271.

(*p*) *Greenwood's case*, 13 Ves. 89; 3 Bro. C. C. 444; see 4 Y. & C. 389; also 3 Curt. App.; *Dew* v. *Clarke*, Hagg. Lond. 1826; *Fullick* v. *Allinson*, 3 Hagg. Eccl. Rep. 527—547; *Banks* v. *Goodfellow*, L. R., 5 Q. B. 549; *Smee* v. *Smee*, 5 P. D. 84; *Murfett* v. *Smith*, 12 P. D. 116; *Boughton* v. *Knight*, *ubi sup.*; and cf. ante, p. 16.

(*q*) See the cases cited in the preceding note, particularly *Banks* v.

other words, that the will was affected by the delusion in which the insanity consisted, or by general weakness resulting from it (*r*).

Lucid interval.

(e.) *A fortiori* is the validity of the will unimpeached where the testator, though found a lunatic by inquisition, or confined in lunatic asylums, or even under constraint, has made and executed his will during a lucid interval (*s*).

Critical time.

According to existing law, the sound and disposing mind and memory must exist at the actual moment of execution (*t*). Hence, part of a will may be established and part held not entitled to probate, if incapacity be shown at the time of the execution of the latter part (*u*). Previously to January 1st, 1838, mere instructions for a will, if reduced into writing before the death of the testator, might operate as a will. Accordingly, it was held that a will executed in conformity to instructions might be established, though the testator might have become incapable before the will was read over to or executed by him (*x*).

Revocation of wills.

The principles applicable to the making of a valid will in the first instance determine also the validity of the revocation of a will validly made (*y*). "If a man of sound mind," says Coke, "makes his will, and afterwards becomes *non compos mentis*, he cannot revoke it during the con-

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Goodfellow, and *Boughton* v. *Knight*. So, it seems that undue influence will not necessarily invalidate the whole of a will, but so much only as was due to it. *Trimlestown* v. *D'Alton*, 1 Dow & C. 85.

(*r*) *East India Company* v. *Dyce Sombre*, 4 W. R. 714.

(*s*) Page 352, n. (*f*), *supra*.

(*t*) *Billinghurst* v. *Vickers*, 1 Phill. Eccl. R. 187, 191; *Wood* v. *Wood*, ib. 357; cf. *Trimlestown* v. *D'Alton*, 1 Dow & C. 85; *Haddock* v. *Trotman*, 1 Fost. &. F. 31; *Brouncker* v. *Brouncker*, 2 Phill. Eccl. Rep. 57. Hence, a will executed during insanity does not become valid by the subsequent recovery of the testator. 11 Mod. 157; Shep. T. 413; 1 Sid. 162.

(*u*) *Brouncker* v. *Brouncker*, 2 Phill. Eccl. Rep. 57.

(*x*) *Moore* v. *Hacket*, 2 Cas. t. Lee, 147; *Sellars* v. *Garnett*, cit. ib. p. 115; *Fullick* v. *Allinson*, 3 Hagg. 527; *Seeman* v. *Seeman*, 1 Cas. t. Lee, 180.

(*y*) *Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497.

tinuance of such disability" (*z*). And the Wills Act, in prescribing the various acts which are to revoke a will, provides that they must be done "with the intention of revoking the same" (*a*). An act done without the intention to revoke is wholly ineffectual, and it is clear that an insane person cannot have any intention. So, if a will duly executed during the sanity of a testator be during his insanity subjected to any such treatment as would amount to a revocation were he sane at the time, it may be established, and that even if it have been destroyed, upon satisfactory proof being given of its having been destroyed and of its contents (*b*). As the act of revocation during insanity has no effect to revoke a valid will, so *a fortiori* the fact of supervening insanity has no such effect (*c*). And herein the rule of the common law is conformable to that of the civil. *Nam neque testamentum recte factum neque ullum aliud negotium recte gestum postea furor interveniens perimit* (*d*).

Destruction of wills.

Supervening insanity.

Though parol or documentary evidence will not in general be admitted to explain the meaning of a will, yet when suspicion is thrown on the sanity of a testator, parol or documentary evidence will be admitted to show that the will is the expression of an intention deliberately formed and steadily persevered in (*e*). Conversations preparatory to the will being made, letters in relation to it, the instructions taken for it, the remarks and the conduct of the testator at the time of executing it, all these are of importance to show whether in fact the testator was aware of

Evidence.

(*z*) 4 Rep. 61 a.

(*a*) 1 Vict. c. 26, s. 20.

(*b*) *Saxby* v. *Fordham*, 1 Add. 74; *In the goods of Brand*, 3 Hagg. 754; *Harris* v. *Berrall*, 1 Sw. & Tr. 153; and see also *Sprigge* v. *Sprigge*, L. R., 1 P. & D. 608; *Benson* v. *Benson*, L. R., 2 P. & D. 172; and as to probate of a will lost or destroyed, without the *animus revocandi*, see *Brown* v. *Brown*, 8 E. & B. 876; *Sugden* v. *Lord St. Leonards*, L. R., 1 P. D. & A. Div. 154; and the cases there cited.

(*c*) 4 Rep. 61 a.

(*d*) Inst. lib. 2, tit. 12, s. 1.

(*e*) Wms. Ex. pt. i. Bk. iv. ch. 2, s. 5, generally.

the character of the act he was performing and all that it implied (*f*).

Will in the handwriting of the testator.

One fact in particular, viz., that of the will being in the handwriting of the testator, is of so much value for this purpose (*g*) as to suggest the practical advice that when a will is made under circumstances rendering it probable that doubt or suspicion may arise, as *e. g.*, when the testator is subject to a commission of lunacy, is the inmate of a lunatic asylum, or even has at any time previously been under treatment for mental disease, the professional adviser should not merely make the preliminary acts, especially the instructions for the will, as marked and formally regular as possible, but that he should cause the testator to write out his own will for himself.

Value of the attestation as evidence of sanity.

It has been stated that the mere attestation of a will is *ipso facto* an argument that the witnesses believed the testator to be of a sound and disposing mind (*h*); but the act is often regarded as a mere formality, and a desire not to irritate the testator, stronger perhaps in proportion to the violence of the mental disease, would make many perform it without any belief of the kind. Nevertheless, Mansfield, C.J., said that evidence by an attesting witness impeaching the will showed that the witness, instead of finding credit, deserved the pillory (*i*); Eldon, C., that, though admissible, it was to be received with the most scrupulous jealousy (*k*); and Sir J. Nichol, that it could not be relied on unless corroborated by other evidence (*l*).

(*f*) Per Eldon, C., 9 Ves. 610; *Levy* v. *Lindo*, 3 Mer. 81; *Filmer* v. *Gott*, 4 Br. P. C. 230; *Fane* v. *Devonshire*, 6 Br. P. C. 137; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574; *Butlin* v. *Barry*, 1 Curt. 629; *Durling* v. *Loveland*, 2 Curt. 225.

(*g*) See *Cartwright* v. *Cartwright*, 1 Phill. Eccl. Rep. 90. See also 4 Hagg. 226. On the other hand, see *Clarke* v. *Lear*, cit. ap. 1 Phill. 119, by Sir W. Wynne.

(*h*) Shelf. on Lun. p. 376.

(*i*) *Walton* v. *Shelley*, 1 T. R. 300; conf. *Lowe* v. *Jolliffe*, 1 W. Bl. 366; *R.* v. *Nevys*, 1 W. Bl. 416; *Goodtitle* v. *Clayton*, 4 Burr. 2225.

(*k*) *Bootle* v. *Blundell*, 19 Ves. 504; cf. *Howard* v. *Braithwaite*, 1 V. & B. 208.

(*l*) *Kinleside* v. *Harrison*, 2 Phill. Eccl. R. 499; cf. *Burrows* v. *Lock*,

As a matter of fact, a will has been established against the evidence of all the attesting witnesses (*m*). On the other hand, where there are signs of fraud, and the will rests on the evidence of the attesting witnesses alone, they must themselves be above suspicion, and if shaken in any respect, no part of their evidence can be relied on (*n*).

Certain relations and circumstances constituting satisfactory proof of sanity in the testamentary act.

Influence.

The existence of certain intimate relations between a testator and the persons about him at the time of making his will and benefited by it, makes the court more than ever scrupulous in demanding proof of mental capacity (*o*). Such are the relations of medical man and patient (*p*), parent and child (*q*), child and parent (*r*), husband and wife (*s*), occasionally even wife and husband (*t*), spiritual adviser and penitent (*u*), but the amplest jealousy of the law is reserved for the relation of legal adviser and client (*v*). Some judges have almost gone the length of holding that the existence of this relationship creates an absolute dis-

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10 Ves. 474 ; *Young* v. *Richards*, 2 Curt. 373 ; *Pennant* v. *Kingscote*, 3 Curt. 642 ; *Hudson's case*, Skinn. 79 ; *Diggs's case*, cit. ib.

(*m*) *Le Breton* v. *Fletcher*, 2 Hagg. Eccl. R. 558 ; *Lowe* v. *Jolliffe*, 1 W. Bl. 366 ; *Austin* v. *Willes*, Bull. N. P. 264 ; and see *Starnes* v. *Martin*, 1 Curt. 294 ; *Dew* v. *Clark*, 2 Phill. Eccl. Rep. 100 ; *Landon* v. *Nettleship*, 2 Add. 245 ; *Mackenzie* v. *Handasyde*, 2 Hagg. 219.

(*n*) *Brydges* v. *King*, 1 Hagg. Eccl. Rep. 288.

(*o*) *Segrave* v. *Kirwan*, Beatty, 157, 166; *Bulkley* v. *Wilford*, 8 Bl. 111 ; *Butlin* v. *Barry*, 1 Curt. 629; *Durling* v. *Loveland*, 2 Curt. 225.

(*p*) Cf. *e.g.*, *Popham* v. *Brooke*, 5 Russ. 9.

(*q*) Cf. *e.g.*, *Wright* v. *Vanderplank*, 2 K. & J. 1.

(*r*) *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. R. 211.

(*s*) *Mynn* v. *Robinson*, 2 Hagg. Eccl. R. 179 ; *Moss* v. *Brander*, 1 Phill. Eccl. R. 254 ; *Baker* v. *Batt*, 2 Moo. P. C. 317 ; *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. R. 84.

(*t*) *Hacker* v. *Newborn*, Style's R. 427 ; Vin. Abr. tit. Devize (Z. 2), pl. 3, 7; and cf. Swinb. pt. vii. s. 2, but see *Williams* v. *Goude*, 1 Hagg. Eccl. R. 577 ; see also *Lamkin* v. *Babb*, 1 Cas. t. Lee, 1 ; *Harwood* v. *Baker*, 3 Moo. P. C. 290.

(*u*) *Middleton* v. *Sherburne*, 4 Y. & C. 358 ; cf. *Huguenin* v. *Baseley*, 14 Ves. 273.

(*v*) *Segrave* v. *Kirwan*, Beatty, 157 ; *Maccabe* v. *Hussey*, 2 Dow. & Cl. 440 ; *Ingram* v. *Wyatt*, 1 Hagg. Eccl. Rep. 384 ; *Wyatt* v. *Ingram*, 3 Hagg. Eccl. Rep. 466 ; *Raworth* v. *Marriott*, 1 M. & K. 643 ; *Dufaur* v. *Croft*, 3 Moo. P. C. 136.

qualification to benefit by the will (*x*), but this is certainly not the case (*y*).

Still greater jealousy is aroused where it is alleged either that the testator had a weakness, which, even though not amounting to incapacity, was liable to make him the instrument of those about him (*z*), or was of extreme age (*a*); or that the will was obtained or prepared by, or prepared on the instructions of, a person benefited thereby (*b*), especially when that person was the legal, medical, or spiritual adviser of the testator, or stood in some other position of influence towards him (*c*); or where a knowledge of the contents of the will is not brought home to the testator (*d*); or the will was prepared on verbal instructions only (*e*); or where there was any concealment or misrepresentation as to the subject-matter (*f*); or where the will is at variance with the known affections of the

Weakness.

(*x*) E.g. Buller, J., in *Hicks* v. *Parr*, cit. ap. 1 Bl., N. S. 458, 476; and in *Walker* v. *Stephenson*, 3 Esp. 284; *Revett* v. *Braham*, 4 T. R. 497.

(*y*) *Paine* v. *Hall*, 18 Ves. 475; *Bird* v. *Bird*, 2 Hagg. Eccl. R. 142; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574; *Wyatt* v. *Ingram*, ib. 464.

(*z*) *Ingram* v. *Wyatt*, 1 Hagg. Eccl. Rep. 384; *Dodge* v. *Meech*, ib. 612; see also *Donegal's case*, 2 Ves. 408; per Hardwicke, C.; *Mountain* v. *Bennet*, 1 Cox, 355.

(*a*) *Kinleside* v. *Harrison*, 2 Phill. Eccl. Rep. 461, 462; *Griffiths* v. *Robins*, 3 Madd. 191; Swinb. pt. ii. s. 5, pl. 1; Godolph. pt. i. c. 8, s. 4.

(*b*) *Billinghurst* v. *Vickers*, 1 Phill. Eccl. R. 193; *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. R. 211. As to will obtained by force, see *Mountain* v. *Bennet*, 1 Cox, 355; by intimidation, Godolph. pt. iii. c. 25, s. 8; Swinb. pt. vii. s. 2; *Nelson* v. *Oldfield*, 2 Vern. 76; by importunity, *Constable* v. *Tuffnell*, 4 Hagg. Eccl. R. 477; *Wise* v. *Johnson*, 1 Cas. t. Lee, 700; by interrogatories, *Green* v. *Skipworth*, 1 Phill. Eccl. R. 58; prepared by legatee, *Paske* v. *Ollat*, 2 Phill. Eccl. R. 323; on the instructions of legatee, *Dodge* v. *Meech*, 1 Hagg. Eccl. R. 612.

(*c*) Vide cases cit. in notes, p. 358, ante.

(*d*) *Paske* v. *Ollat*, 2 Phill. Eccl. R. 323; cf. 3 Hagg. Eccl. R. 467, 468.

(*e*) *Middleton* v. *Forbes*, 1 Hagg. Eccl. R. 398; *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. R. 211.

(*f*) *Segrave* v. *Kirwan*, Beatty, 157; Swinb. pt. vii. s. 3, pl. 3; and cf. cases cit. per Lord Lyndhurst, in *Allen* v. *Macpherson*, 1 H. L. C. 207, 208.

testator (*g*); or his previous declarations (*h*); or his dispositions in former wills (*i*); or a general sense of propriety (*k*); or where the will has been clandestinely obtained or executed (*l*). Any of these circumstances awake suspicion, and the more suspicion in proportion as the larger number of them are combined in the same case; but they do no more than this, and the suspicion may be allayed by evidence which shows that the will was really the disposition of the sound and disposing mind of the testator (*m*).

Courts in which the validity of wills may be raised.

The question of the validity of a will of personalty may be raised in the Probate Division affirmatively by probate in solemn form (*n*), negatively by moving for administration as on an intestacy (*o*), or by a *caveat* (*p*).

Where the court declares against the will it will order it to be deposited in the registry nevertheless (*q*).

The question of the validity of a will of realty may be raised affirmatively in the Probate Division by probate citing the heir (*r*), in the Chancery Division by an action to establish the will (*s*); negatively, by an action for the

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(*g*) *King* v. *Farley*, 1 Hagg. Eccl. R. 502; *Brydges* v. *King*, ib. 256; *Coghlan's case*, 19 Ves. 508; and see 1 Dow, P. C. 178; 1 Phill. Eccl. R. 120; 3 B. C. C. 444; 3 Hagg. Eccl. R. 547.

(*h*) *Baker* v. *Batt*, 2 Moo. P. C. 317; *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. R. 84; *Brydges* v. *King*, 1 Hagg. Eccl. R. 256.

(*i*) *Mynn* v. *Robinson*, 2 Hagg. Eccl. R. 179; *Brydges* v. *King*, *ubi sup.*

(*k*) *Butlin* v. *Barry*, 1 Curt. 619; *Durling* v. *Loveland*, 2 Curt. 225.

(*l*) *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. R. 211; *Paske* v. *Ollat*, 2 Phill. Eccl. R. 323; *Wyatt* v. *Ingram*, 3 Hagg. Eccl. R. 467.

(*m*) *Ross* or *Russ* v. *Chester*, 1 Hagg. Eccl. R. 227; *Dodge* v. *Meech*, ib. 620; *Bird* v. *Bird*, 2 Hagg. Eccl. R. 142.

(*n*) Williams on Executors, 337, ed. 8 *et seq.*; 20 & 21 Vict. c. 77, ss. 61—63.

(*o*) *In bonis Watts*, 1 Curt. 594; *In bonis Bourget*, ib. 591.

(*p*) 1 Williams on Executors, p. 587, ed. 8.

(*q*) *In bonis Bourget*, 1 Curt. 591.

(*r*) 20 & 21 Vict. c. 77, ss. 61 *et seq.*; and see *Barraclough* v. *Greenhough*, L. R., 2 Q. B. 612.

(*s*) 1 Dan. Ch. Pr. pp. 602 *et seq.*

recovery of land (*t*), or, where this is impracticable, by an action to set aside the will (*u*).

As to the Custody of the Wills of Lunatics so found by Inquisition.

Where any lunatic so found by inquisition has executed any will, codicil, or other testamentary paper, any person in whose custody or control the same may be, is at liberty, and if such person is the committee of the lunatic, he is bound, to deposit the same in the master's office upon oath, as they may direct, there to remain for safe custody (*x*). Formerly, a special order on petition was required for that purpose (*y*). The oath usually accounts for the manner in which the will came into the possession of the depositor, and states that it is in the same state as when he received it (*z*). The practice as to opening the will on the death of the lunatic has been already stated (*a*).

The will of a person who subsequently becomes lunatic, and dies without recovering, has been held to speak from the date of the will, where to construe it as speaking from the date of his death would have defeated the intention of the testator (*b*); but it may be doubted whether any general rule can be laid down on the subject.

The question whether an action will lie during the life of a lunatic to perpetuate testimony as to the due execution of his will, or the reverse, has been already discussed (*c*).

(*t*) *Jones* v. *Jones*, 7 Price, 663; *Jones* v. *Frost*, Jac. 466.

(*u*) Ib.; *Pemberton* v. *Pemberton*, 13 Ves. 297, 298; *Middleton* v. *Sherburne*, 4 Y. & C. 358.

(*x*) R. L. 1890, 45.

(*y*) *Re Thompson*, 1 Russ. & M. 355; *Re Humpleby*, 2 Coop. T. L. C. 166.

(*z*) The will must be inclosed in an envelope, and marked as an exhibit to the affidavit.

(*a*) Ante, p. 213.

(*b*) *Wheeler* v. *Thomas*, 7 Jur., N. S. 599; *In re Hartley's Trusts*, 26 W. R. 590.

(*c*) Ante, pp. 340, 341.

CHAPTER XII.

CONVERSION, ADEMPTION, ELECTION, IN RELATION TO LUNATICS' ESTATES.

Of the various modes in which the quality of an estate may be changed.

THE character of the estate may be changed in various ways :

1. By the sale, purchase or exchange of realty for personalty, or personalty for realty.
2. By the sale or exchange of a specific particular, whether of real or personal estate.
3. By the election to take in either form real property directed to be sold, or personal property impressed with the character of realty.

Again, the change may be made by the direction of a court of competent jurisdiction, or (waiving the question as to what title passes) without that direction; and in the latter case it may be made either *bonâ fide* or fraudulently.

The legal effect of changes made in these several ways and under these various circumstances is before us.

Conversion.

1. Of the sale, purchase or exchange of real estate for personal, or of personal estate for real.

(a.) Under the direction of the court (*a*), wherein observe that—

(1) The court will not alter the condition of the lunatic's property (*b*).

(2) Except for the benefit of the lunatic (*c*) ;

(*a*) Cf. Bk. II. Pt. i. c. 16, *passim*.

(*b*) *Ex parte Grimstone*, Amb. 707 ; *Ex parte Bromfield*, 1 Ves. jun. 453 ; *Oxenden* v. *Compton*, 2 Ves. jun. 69 ; *In re Pares*, 12 Ch. D. 333 ; *In re Barker*, 17 Ch D. 241, *ante*, p. 161 ; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672 ; *Re Pickard*, 53 L. T., N. S. 293 ; *In re Tugwell*, 27 Ch. D. 309.

(*c*) Ib. ; and *Ex parte Phillips*, 19 Ves. 118.

(3) When no regard will necessarily be paid to the eventual rights of successors (*d*). Conversion.

(4) Changes occurring in the ordinary course of management will not be provided against (*e*) ;

(5) Changes outside the ordinary course of management will usually be prevented from prejudicing the interests of representatives (*f*),

(6) And are so prevented by statute where the change is from land into money (*g*) ;

(7) Where from money into land, a charge may be declared in favour of the personal estate (*h*), but will not necessarily be so (*i*).

(b.) Where the change is produced without the direction of the court, but at the same time without breach of confidence, whether *bonâ fide* by a trustee or committee (*k*), or under any circumstances by a

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(*d*) *Dormer's case*, 2 P. Wms. 263 ; *Ex parte Chumley*, 1 Ves. jun. 297 ; *Ex parte Baker*, 6 Ves. 8, *et sœpe*.

(*e*) Ib., *et ante*, pp. 164, 165 ; see particularly *Bevan's case*, cit. 1 Ves. jun. 455, 457 ; *Ex parte Bromfield*, 1 Ves. jun. 453 ; *Oxenden* v. *Compton*, 2 Ves. jun. 69 ; *Shelly's case*, cit. 1 Ves. jun. 457 ; *Ex parte Phillips*, 19 Ves. 124 ; *Newport's case*, cit. 2 Ves. jun. 73 ; *Sergeson* v. *Sealey*, 2 Atk. 414 ; *Re Badcock*, 4 M. & C. 440 ; *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672.

(*f*) *Sergeson* v. *Sealey*, *ubi sup.* ; *Oxenden* v. *Compton*, *ubi sup.* ; *et sœpissime*, vide *ante*, pp. 164, 167, 183, 184, 187, 188 ; *In re Tugwell*, 27 Ch. D. 309 ; *Re Pickard*, 53 L. T., N. S. 293.

(*g*) 53 Vict. c. 5, s. 123, sub-s. (1), ante, pp. 165, 183 ; but a married woman can consent to the payment of proceeds of real estate to her husband without a deed acknowledged. *Re Wheeler*, 4 De G., F. & J. 540 ; *Re Trevelyan*, 31 L. J., N. S., Ch. 560. On the other hand, the proceeds of land of which the lunatic was tenant in tail will not be paid out to his representative without a disentailing deed. *Re Butler's Will*, L. R., 16 Eq. 479 ; *Re Reynolds*, 24 W. R. 991 ; over-ruling *Re Rowe*, L. R., 17 Eq. 300 ; cf. also *Re Broadwood's Settled Estates*, 1 Ch. D. 438 ; as compared with *Re Wood's Settled Estates*, L. R., 20 Eq. 372.

(*h*) 53 Vict. c. 5, s. 118 ; *Re Badcock*, 4 M. & Cr. 440 ; *Re Leeming*, 3 De G., F. & J. 43 ; *In re Melly*, 31 W. R. 898.

(*i*) *Ex parte Phillips*, 19 Ves. 124.

(*k*) See the cases on infants in Lewin on Trusts, pp. 967—969 ; *Flanagan* v. *Flanagan*, cit. 1 B. C. C. 500.

stranger (*l*), no equity arises between the real and personal representatives.

(c.) Where a committee, entrusted with the care of an estate, abuses his trust to change its quality in order to serve his own interest, there does arise an equity to undo a trust tortious in that way (*m*).

Ademption.

2. Of the change or loss of a specific particular during the lunacy.

(1) No change will, if possible, be allowed (*n*).

(2) Where specific realty has been disposed of under the order of the court, the surplus proceeds will descend as land under 53 Vict. c. 5, s. 123 (*o*).

(3) Where specific personalty has been disposed of by some person who has assumed to deal with the property of the lunatic without being legally qualified to do so, and the dealing is not in the ordinary course of business, the specific legacy is not adeemed (*p*).

(4) In all other cases the sale or change of character of the specific particular adeems the legacy (*q*).

Election.

3. The right to elect in what character land having the quality of personalty and personalty having that of land shall be taken, cannot be exercised by the lunatic, and will not, if it can be avoided, be exercised by the court (*r*).

(*l*) *Anon.*, cit. 1 Ves. jun. 462.

(*m*) Ib. ; and *Ex parte Ludlow*, 2 Atk. 407.

(*n*) *Ex parte Haycock*, 5 Russ. 154.

(*o*) *Freeman* v. *Ellis*, 1 H. & M. 758.

(*p*) *Midland Counties Railway Company* v. *Oswin*, 1 Coll. C. C. 80 ; *Taylor* v. *Taylor*, 10 Ha. 475 ; *Jenkins* v. *Jones*, L. R., 2 Eq. 323 ; *In re Larking*, 37 Ch. D. 310.

(*q*) *Browne* v. *Groombridge*, 4 Madd. 495 ; *Jones* v. *Green*, L. R., 5 Eq. 555 ; and cf. *Holmes* v. *Goodworth*, 7 L. J., Ch. 128, before 11 Geo. 4 & 1 Will. 4, c. 65 ; *In re Freer*, 22 Ch. D. 622.

(*r*) *Ashby* v. *Palmer*, 1 Mer. 301 ; *Re Wharton*, 5 De G., M. &

The right to elect to take under or against a will may, where a lunatic is so found, be exercised by his committee under the direction of the court; where he is not so found, as it cannot be exercised by himself, it may be by his representatives after his death (*s*).

The rights of succession to a lunatic's property as before mentioned will not be altered: thus in sanctioning the enfranchisement of copyholds the court will see that the rules of descent are not interfered with (*t*).

G. 33; *Dixie* v. *Wright*, 32 Beav. 662. But the artificial character is retained merely to determine the transmission. *Re Wheeler*, 4 De G., F. & J. 540; *Re Trevelyan*, 31 L. J., N. S., Ch. 560; *Wilder* v. *Pigott*, 22 Ch. D. 263.

(*s*) *Re Hewson*, 23 L. J., N. S., Ch. 256.

(*t*) *In re Ryder*, 20 Ch. D. 514; see *Att.-Gen.* v. *Marquis of Ailesbury*, 12 App. Cas. 672; *In re Barker*, 17 Ch. D. 241; *In re Pares*, 12 Ch. D. 333.

CHAPTER XIII.

INSANITY IN RELATION TO MISCELLANEOUS PERSONS AND THINGS.

Lord Chancellor presents to lunatic's church.

1. *Advowson.*—A lunatic cannot present to a church, neither, supposing him to have been so found by inquisition, can his committee. The power is vested in the lord chancellor by virtue of his general authority, a principle recognized since the time of Lord Talbot (*a*).

Advowson, where it may be sold.

An advowson cannot, any more than other parts of the real property of a lunatic, be sold for any purpose other than those for which express power of sale is given by law (*b*).

Conflict of titles where lunatic a Roman Catholic.

Where a lunatic had, before his lunacy, been of the Roman Catholic faith, and the last presentation to the living had devolved upon the University of Oxford, it was questioned whether, in case of the living becoming vacant during the lunacy, the right of the university or of the crown would prevail (*c*).

It is submitted that the presentation would be with the crown.

Lunatic as agent or attorney.

2. *Agent or Attorney.*—It is laid down that insane persons cannot do as agents or attornies any act binding on their principals, for they have not any legal discretion or understanding to bestow upon the affairs of others any more than upon their own (*d*).

Acts, however, which would have been binding upon the

(*a*) Com. Dig. Idiot (C); 1 Woodd. Lect. p. 409.

(*b*) *Re Vavasour*, 3 Mac. & G. 275.

(*c*) Ib.

(*d*) Jarm. Conv. vol. 8, pt. i. p. 10; Russell, Merc. Agency, p. 5; Story on Agency, p. 8.

insane person if done by himself, will, presumably, when he is an agent, be equally binding on his principal (*e*); a lunatic wife, *e.g.*, could pledge her husband's credit to a person having no notice of her insanity, in any case in which she could have pledged his credit if sane.

Again, many acts of an agent or attorney are purely of a ministerial nature, and such acts might, it is conceived, be validly performed notwithstanding the insanity of the individual who performs them (*f*).

Agent or attorney of lunatic.

A lunatic cannot appoint an agent or attorney (*g*).

However, when a lunatic has, before his lunacy, appointed an attorney, whether for a specific purpose or generally, the attorney may act notwithstanding the lunacy, the act having relation to the time when the authority was given (*h*).

In *Drew* v. *Nunn* (*i*) the question whether an agent's authority is terminated by the principal's insanity was raised but not decided. Bramwell, L.J., said that partial mental derangement was not sufficient.

And even where the power is a general power, it would seem that its continuance in any given case was always determined upon similar principles to those already discussed, which decide the liability of lunatics under contracts (*k*).

A retainer given to a solicitor before the lunacy will extend to enable the solicitor to take such steps as become necessary in consequence of the lunacy (*l*).

Parish apprentices.

3. *Apprentice.*—Justices may discharge a parish appren-

(*e*) For these, vide ante, Bk. ii. c. 1.

(*f*) Cf. the case of the lord of a manor, or the steward of a manor, accepting surrenders and making grants during incapacity. Co. Cop. ss. 34, 45; 4 Rep. 23 b; 8 Rep. 63 b; 1 Watk. 255; ante, p. 175.

(*g*) Britt. 285 b; Shepp. Touchst. 218; Perk. c. 1, s. 23; 2 Roll. Abr. 2 (E), pl. v.

(*h*) 44 & 45 Vict. c. 41, s. 47; *Jennings* v. *Bragg*, Cro. Eliz. 446; Perk. c. 1, s. 22.

(*i*) 4 Q. B. D. 661; *Grove* v. *Johnston*, 24 L. R., Ir. 352.

(*k*) See *Ex parte Bradbury*, Mont. & Chit. 625; 1 Bell, Comm. 525; ante, pp. 242 *et seq.*; and see Jarm. Conv. vol. 8, pt. i. p. 5.

(*l*) *Fore Street Warehouse Company* v. *Durrant*, 10 Q. B. D. at page 474.

tice who has become insane, "for it would be hard upon the master to keep one who could do him no service, and the parish in the meantime to go free" (*m*).

Other apprentices.

So, in other cases, it would seem that the High Court would, on the analogy of the relief which it gives in the case of partnership (*n*), dissolve the connection of master and apprentice, in case of the supervening insanity of either party. The practice in case the solicitor to whom a clerk has been articled becomes insane is regulated by express decisions (*o*).

4. *Arbitrator.*—It is needless to say that a lunatic cannot be an arbitrator (*p*).

5. *Archbishop.*—See *Bishop*, infra, p. 370.

6. *Assurance.*—Lunacy should be disclosed on assuring a life (*q*).

As to the effect of suicide on life assurance, *vide* infra, pp. 378, 379, *et seq.*

7. *Attorney.*—See *Agent*, supra, p. 366.

Act of bankruptcy.

8. *Bankrupt.*—A lunatic cannot commit a voluntary act of bankruptcy by omitting to pay or give security in answer to a debtor's summons (*r*); nor, it seems, in any other way (*s*); but the general proposition is open to doubt. At the same time it would be very difficult to establish, for example, an act of fraudulent preference, or a fraudulent

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(*m*) *Anon.*, 1 Skinn. 114; *R.* v. *Charles*, Burr. S. C. 706.

(*n*) Ante, p. 276.

(*o*) Post, p. 377; *Ex parte Turner*, 10 L. J., N. S., Q. B. 356; *Ex parte Darbell*, 6 Dowl. P. C. 505.

(*p*) Bryd. 58.

(*q*) *Lindenau* v. *Desborough*, 3 Man. & Ryl. 45; but see *Sweete* v. *Fairlie*, ap. Shelf. Lun. 532.

(*r*) *Ex parte Stamp*, 1 De G. 345; cf. *Capper* v. *Dando*, 2 Ad. & E. 458.

(*s*) *Ex parte Layton*, 6 Ves. 440; *Ex parte Priddy*, cit. ap. Shelf. Lun. 565; *Ex parte Cahen*, 10 Ch. D. 183.

conveyance, against a lunatic, so as to make it an act of bankruptcy (*s*). But if it appear for the benefit of the lunatic that he should be made bankrupt, leave will be given to the committee to take proceedings to make him a bankrupt (*t*).

Adjudication.

Lunacy will not, however, protect a person against being made bankrupt on an act of bankruptcy committed while he was sane (*u*); and therefore, presumably, not where the act of bankruptcy is committed during a lucid interval.

Affidavit.

The affidavit in bankruptcy usually made by the bankrupt himself, may, it seems, in case of his lunacy, be made by some other person on his behalf (*x*).

Proof.

9. *Bankruptcy.*—Proof in bankruptcy, on behalf of a lunatic so found by inquisition, will, of course, be made by the committee of his estate (*y*).

Proof on behalf of lunatic not so found.

Where the lunatic has not been so found, the practice has been to allow some other person to prove on his behalf. Thus, a friend of the family (*z*), and the mother (*a*) of the creditor, have been so allowed. The application for leave to prove should be made in the usual way, and the applicants will not be made liable for the trustee's cost of appearance (*b*).

The creditor's affidavit will be dispensed with; and any evidence that may be deemed satisfactory admitted in support of the debt (*c*).

The committee of the estate of a lunatic cannot appoint a proxy to vote for the lunatic without the sanction of the court (*d*).

(*s*) But see *Ex parte Farr*, 10 L. T., N. S. 44.

(*t*) *In re James*, 12 Q. B. D. 332; *Ex parte Cahen*, 10 Ch. D. 183; *In re Lee*, 23 Ch. D. 216; *In re Brady*, 19 L. R. Ir. 71.

(*u*) *Anon.*, 13 Ves. 590.

(*x*) *Ex parte May*, 2 M. D. & D. 381; *Ex parte Roberts*, Mont. & C. 653; *In re Brady*, 19 L. R. Ir. 71.

(*y*) Robson on Bankruptcy, 6th ed. p. 222.

(*z*) *Ex parte Maltby*, 1 Rose, 387.

(*a*) *Ex parte Oxtoby*, De G. 453.

(*b*) *Ex parte Bucknall*, 12 L. J., N. S., Bank. 42.

(*c*) *Ex parte Clarke*, 2 Russ. 575.

(*d*) *Ex parte Wood*, 10 Ch. D. 554.

10. *Benefice.*—See *Clergy, infra.*

Practice where bishop a lunatic.

11. *Bishop.*—Whenever any archbishop of an English province has reason to believe that any bishop of his province is incapable, by reason of mental infirmity, of duly performing his episcopal functions, he may, after notice, issue a commission to inquire into the state of the mental capacity of the bishop (*e*); and the commissioners, or any two of them, are required to make a report (*f*).

On a report that a bishop is incapable, by reason of mental incapacity, of duly performing his duties, or if a bishop has been found lunatic by inquisition, and the inquisition has not been quashed, or the commission issued in pursuance thereof superseded (in which case no report is necessary) (*g*), another bishop of the same province is appointed to perform his episcopal functions, and a spiritual person is also appointed to assist in the administration of the temporalities (*h*). The persons appointed have the same legal remedies, by action or distress, for enforcing the payment of the revenues of the see as might, but for the incapacity, have been exercised by the incapable bishop (*i*). On his recovery the bishop may be restored (*k*).

Where archbishop a lunatic.

When an archbishop becomes incapable the proceedings are similar, except that the lord chancellor of Great Britain or of Ireland, as the case may be, is substituted for the archbishop, and that the commissioners must possess spiritual qualifications (*l*).

12. *Charities.*—See *Visitors of Charities, infra*, p. 380.

13. *Clergy.*—The living of a beneficed clergyman is not

(*e*) 6 & 7 Vict. c. 62, s. 1.
(*f*) Ib. s. 5.
(*g*) Ib. s. 14.
(*h*) Ib. s. 11.
(*i*) Ib. s. 12.
(*k*) Ib. s. 15.
(*l*) Ib. s. 7.

vacated by his becoming of unsound mind (*m*), but the bishop of the diocese appoints a curate to perform the services of the church, and the stipend of the curate is provided out of the profits of the living (*n*). Where the beneficed clergyman has been found a lunatic by inquisition, the committee of the estate must pay the appointed stipend to the curate (*o*). The creditors of a lunatic incumbent may obtain a sequestration against his living for payment of their debts (*p*).

14. *Corporation.*—A lunatic is not liable to serve as the officer of a municipal corporation (*q*). Under the Companies Act, 1862, s. 141, the liquidator of a company who has become insane, may be removed and another liquidator appointed in his place (*r*).

15. *Domicil.*—A lunatic cannot change his own domicil (*s*), nor probably will the custody of a lunatic carry with it the power of changing it either. But if a man at the time he attains his majority is of unsound mind, and remains in that state continuously, the incapacity of minority never having been followed by adult capacity, will continue the father's right of choice of domicil for his son, and then a change of domicil by the father will usually produce a similar change in the domicil of the son (*t*).

16. *Friendly Society.*—Insanity is such a sickness as may, in the absence of anything in the rules to the con-

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(*m*) Shelf. Lun., p. 617; 1 Burn's Ecc. L. tit. "Coadjutor"; *Pace's case*, Dyer, 303 (*a*), n.

(*n*) 1 & 2 Vict. c. 106, ss. 77, 86.

(*o*) Ib. s. 79.

(*p*) *Ex parte Hastings*, 14 Ves. 182; Shelf. Tithes, 3rd ed. 24—28; Burn's Ecc. L. tit. "Sequestration."

(*q*) 5 & 6 Will. 4, c. 76, s. 51.

(*r*) *In re North Molton Mining Co.*, 34 W. R. 527.

(*s*) *Bempde* v. *Johnson*, 3 Ves. 201; *Hepburn* v. *Skirving*, 9 W. R. 764; cf. the cases on the status of irremovability, e.g., *Reg.* v. *Whitby*, L. R., 5 Q. B. 325.

(*t*) *Sharpe* v. *Crispin*, L. R., 1 P. & D. 611.

trary, entitle the insane person to relief on the ground of sickness (*u*).

17. *Guardian.*—A lunatic cannot be the guardian or next friend of another person, "for one who cannot govern himself will be unable to manage another or his concerns" (*x*).

As to cases in which the consent of the guardian is required for a marriage, see *Parents, infra,* p. 375.

18. *Judge.*—A person is practically disqualified for being a judge by insanity. Still it seems that ministerial acts done by a judge who was a lunatic have been held good (*y*).

19. *King or Queen.*—There are two precedents in English history for the procedure in case of the insanity of a monarch of this realm, those, namely, of Henry VI. and George III. The precedents of procedure in the case of an infant monarch, for many purposes a parallel case, are more numerous (*z*).

On the illness of George III. being reported to parliament in 1788, a select committee consisting of twenty-one members was appointed by each House to examine the physicians who attended him, touching the state of his health, and to report such examination to the House (*a*). After the examination of the king's physicians, committees were in like manner appointed to examine and report precedents of such proceedings as might have been used in case of the personal exercise of the royal authority being prevented or interrupted by infancy, sickness, in-

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(*u*) *Burton* v. *Eyden*, L. R., 8 Q. B. 295.

(*x*) Co. Litt. 88 b; *Ex parte Brydges*, H. T. 1791; 2 Fonb. Eq. 249, n.

(*y*) Bryd. 65, 85; Brooke's Abr. 258, pl. 7; Mirror of Justices, c. 2, s. 2.

(*z*) Hallam's Middle Ages, 6th ed., pp. 273 *et seq.*; Lords' Journ. 17th Dec. 1788; Com. Journ. 12th Dec. 1788.

(*a*) Lords and Com. Journ. 8th Dec. 1788.

firmity or otherwise, with a view to provide a remedy for the same (*b*).

Immediate action in these investigations was interrupted by the temporary recovery of the king; but in 1810, on a return of the malady, it was reported by a joint committee of the two Houses, that it was expedient that his royal highness the Prince of Wales, being resident within the realm, should be empowered to exercise and administer the royal authority according to the laws and constitutions of the United Kingdom, in the name and on behalf of his Majesty, and under the style and title of Regent of the United Kingdom, and to use, execute, and perform in the name and on behalf of his Majesty, all authorities, prerogative acts of government, and administration of the same, which belong to the king of this realm, to use, execute, and perform according to the laws thereof (*c*).

The Prince of Wales was accordingly appointed regent during the lunacy of his father (*d*).

Payment to lunatic.

20. *Legacies, annuities, and other moneys* payable to a lunatic continue to be payable to him until he is duly found by inquisition (*e*). It does not, however, follow that trustees or executors will be punished with costs or otherwise for accumulating on behalf of the lunatic, instead of paying either capital or income to him (*f*).

Gift for special purposes.

When a legacy is given to a person for a particular purpose, which is defeated by his becoming a lunatic, the gift will prevail or not according as there is or is not an absolute gift as regards the estate; in other words, according

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(*b*) Lords and Com. Journ. Dec. 1788, *passim*.

(*c*) Lords Journ. 4th Jan. 1811; Com. Journ. 2nd Jan. 1811.

(*d*) 51 Geo. 3, c. 1; 52 Geo. 3, cc. 6, 7, 8; 7 Will. 4 & 1 Vict. c. 72; 3 & 4 Vict. c. 52; and see Parliamentary Debates, 1788, 1789, 1810; Cobbett's Parl. Debates, vol. 18.

(*e*) *Winthrop* v. *Winthrop*, 1 Coop. T. L. C. 196; and vide post, p. 376.

(*f*) *Pothecary* v. *Pothecary*, 18 L. J., N. S., Ch. 48.

as the purpose attaches to the gift after or before it is severed from the estate (*g*).

A trustee is justified in paying into court, under the Trustee Relief Act, a legacy due to a lunatic not so found by inquisition (*h*).

To impute lunacy, when libellous.

21. *Libel.*—It is a libel to publish falsely of a person that he labours under mental derangement (*i*); and the signing of an order for the admission of a sane person into a public or private lunatic asylum, or the signing of a certificate by a medical man given for the same purpose, if that certificate were given without due inquiry into the facts of the case, would probably receive a similar construction. So, too, a person maliciously suing out a commission of lunacy against a sane person might, it would seem, be considered to have published a libel against him (*k*).

Practice when a member of parliament is a lunatic.

22. *Members of Parliament.* — Idiots and lunatics, except during their lucid intervals, are ineligible as members of parliament (*l*). If a lunatic is elected during a lucid interval, and the lunacy returns and is duly reported to the House, there are, independently of statutory enactment, precedents for declaring the lunatic's seat vacant (*m*).

(*g*) Gift absolute: *Barlow* v. *Grant*, 1 Vern. 255; *Nevill* v. *Nevill*, 2 Vern. 431; *Barton* v. *Cooke*, 5 Ves. 461; *Knox* v. *Hotham*, 15 Sim. 82; *Lewes* v. *Lewes*, 16 Sim. 266; *Noel* v. *Jones*, 16 Sim. 309; *Re Skinner's Trusts*, 1 Johns. & H. 102; *Gough* v. *Bult*, 16 Sim. 45; *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; *Pinsent* v. *Goodwin*, 1 Sw. & Tr. 544; *Campbell* v. *Brownrigg*, 1 Phill. 301; *Kellett* v. *Kellett*, L. R., 3 H. L. 160.

Gift not absolute: *Lassence* v. *Tierney*, 1 Mac. & G. 551, 561, 562; *Gompertz* v. *Gompertz*, 2 Phill. 107; *Bell* v. *Jackson*, 1 Sim., N. S. 547; *Cowper* v. *Mantell*, 22 Beav. 231.

(*h*) *Re Upfull*, 3 Mac. & G. 281; *Re Irby*, 17 Beav. 334; *Re Law*, 7 Jur., N. S. 410; *Re Macfarlane*, 2 J. & H. 673. As to payment out of capital and income respectively, see pp. 234, 241.

(*i*) 1 Chitty, Med. Jur. 351.

(*k*) Cf. ante, p. 64.

(*l*) Whitlock's note on the King's Writ, 461.

(*m*) *Grampound's case*, 1566, D'Ewes' Journal, 126; May, Parl. Pr. 32; see now 49 & 50 Vict. c. 16.

But now the case of the lunacy of a member of the House of Commons is provided for by the Lunacy Vacating of Seats Act, 1886, which enacts the procedure to be adopted for vacating the seat of a lunatic member (*n*).

Where lunacy supervenes for the first time after the election, it seems a petition may be presented by any of the electors on behalf of themselves and the rest, praying the issue of a new writ. The petition will not necessarily be granted, but the House will appoint a committee to inquire into the nature of the alleged malady (*o*). It appears that in cases since the reign of Henry VIII. the House has uniformly adopted this course, and has granted or refused a new writ according as there appeared to be a permanent or temporary incapacity in the member previously returned (*p*).

Consent to marriage.

23. *Parents.*—Where the consent of a parent or other guardian is required for a marriage, and the parent or guardian is *non compos mentis*, application may be made by petition to any division of the High Court of Justice (though the Chancery Division is that to which this matter is attached), and if the marriage appears proper, the same may be judicially declared to be so. This declaration will be as effectual as if the father, guardian or guardians, or mother of the person or persons so petitioning, had consented to the marriage (*q*).

24. *Paupers.*—The wife of a pauper lunatic receives relief as a widow (*r*); his children may be apprenticed without his consent (*s*).

The provisions as to his care, custody and maintenance

(*n*) 49 & 50 Vict. c. 16.

(*o*) Com. Journ. 2 Ap. 1811.

(*p*) Ib.; and App. p. 687; Brooke's Abr. tit. Parliament, s. 7.

(*q*) 4 Geo. 4, c. 76, s. 17; 3 My. & C. 471; *Ex parte Reiley*, 7 Jur. 589; For form of petition see Dan. Ch. Forms, p. 592.

(*r*) Out-door Relief, Prob. Order, 1844, Art. 4.

(*s*) Cons. Gen. Ord. P. L. B. 57.

are, for reasons mentioned in the Preface, not within the scope of the present volume (*t*).

25. *Payments* to lunatics not so found by inquisition, or others in their behalf. Money due to a lunatic, on whatever account, is still payable to him notwithstanding lunacy (*u*), though his receipt will clearly not be a good discharge to a person paying with notice of the lunacy.

In such a case the debtor, especially if his debt is one bearing interest, will do well to pay the money into some respectable bank to the account of the lunatic, giving at the same time notice to the persons having the care and control of the lunatic. The order of the High Court will, however, be a sufficient justification for the payment of money to any person on behalf of the lunatic. And a sum paid into court by a defendant to an action for debt will, in a proper case, be ordered to be paid out to the solicitor of a lunatic plaintiff or to some near relation (*x*).

26. *Rape*, by the Statute of Westminster the 2nd, is defined to be where "a man do ravish a woman married, maid, or other, where she did not consent neither before nor after" (*y*). Hence, rape is possible on the person of an insane woman, for though not against her will, it may be without her consent (*z*). The question therefore is, whether there is sufficient evidence before the jury of the woman's incapacity to give consent. If they are satisfied that she was incapable of expressing consent or dissent, and that the man had connexion with her without her consent,

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(*t*) See 53 Vict. c. 5, generally; Glen's Poor Law Statutes.

(*u*) *Winthrop* v. *Winthrop*, 1 Coop. T. L. C. 196.

(*x*) *Rock* v. *Slade*, 7 Dowl. P. C. 22; *Gliddon* v. *Treble*, 30 L. J., N. S., C. P. 160; *Hessing* v. *Sutherland*, 25 L. J., N. S., Ch. 687; and cf. *Mackie* v. *Darling*, 19 W. R. 796; *Hodgson* v. *Kent and Surrey Building Society*, W. N. 1888, 90.

(*y*) C. 34.

(*z*) *Reg.* v. *Fletcher*, Bell, C. C. 63; *Reg.* v. *Barratt*, 43 L. J., N. S., M. C. 7.

they should find him guilty. But a consent produced by mere animal instinct is sufficient (*a*).

27. *Shareholder.*—A lunatic or idiot shareholder may, under the Companies Clauses Consolidation Act, vote by his committee (*b*). No provision is made in the act for the vote of a lunatic not so found.

Under Table A, sect. (45), of the Companies Act, 1862, a lunatic may vote by his committee, *curator bonis*, or other legal curator.

28. *Ships.*—In the case of the lunacy of any person interested in any ship or any share therein, his committee, if he has been so found, and, if not, then any person appointed by the judge in lunacy, may make declarations and act on behalf of the lunatic under the Merchant Shipping Act (*c*).

This does not, however, give the power of selling or mortgaging the ship on behalf of the lunatic (*d*).

29. *Solicitor.*—If a solicitor to whom a clerk has been articled becomes insane during the clerkship, the court will discharge the clerk from his articles without any assignment, and allow him to enter into fresh articles for the remainder of his time of service; but it will not allow the period during which the master has been insane, and before the new articles are entered into, to be reckoned as part of his requisite period of service (*e*).

30. *Steward of a Manor.*—See a previous chapter on the Management of the Lunatic's Estate (*f*).

(*a*) *Reg.* v. *Fletcher*, L. R., 1 C. C. R. 39; *Reg.* v. *Barratt*, *ubi sup.*

(*b*) 8 & 9 Vict. c. 16, s. 79.

(*c*) 17 & 18 Vict. c. 104, s. 99; Maclachlan's Merchant Shipping, pp. 28, 86, ed. 2.

(*d*) *Michael* v. *Fripp*, L. R., 7 Eq. 95.

(*e*) *Ex parte Turner*, 10 L. J., N, S., Q. B. 356; *Ex parte Darbell*, 6 Dowl. P. C. 505.

(*f*) Ante, p. 175.

Suicide of a lunatic not felony.

31. *Suicide while in an unsound State of Mind.*—The question how far suicide is itself an indication of insanity, and the reasons which weigh with juries to induce them to bring in verdicts of unsound mind in cases of suicide, will be hereafter considered (*g*). When the verdict is actually found in this form, none of the special consequences attendant upon *felo de se* arise. In other words, irresponsibility is regarded as complete (*h*).

Suicide in relation to life assurance.

A more interesting question, in its legal aspect, is the extent to which policies of life assurance are avoided by the suicide of the assured while in a condition of insanity.

1. Where the assured, being himself beneficially interested in the assurance, dies a *felo de se*, public policy avoids the contract (*i*).

2. The same appears to be the law of those who claim under the assured, where the assured was also the party to effect the insurance, and, having had the beneficial interest, has assigned it, whether for valuable consideration or not. The assignee of the chose in action takes subject to the same rights and equities as those the assignor held subject to (*k*).

3. But neither equitable principle nor public policy would seem to demand that the above rule avoiding the policy in case of *felo de se* should apply where the assured is the nominee of the assurer and has no beneficial interest in the insurance. The point, however, does not seem to have been decided.

4. Where the act of suicide takes place when the assured is insane and not accountable for his acts, then, whether he be beneficially interested in the insurance or not, the rule arising from public policy does not apply, and in the absence of any special condition the policy is not avoided (*l*).

(*g*) Post, p. 416.

(*h*) Bac. Abr. Felo de se (A).

(*i*) *Amicable Society* v. *Bolland*, 4 Bl., N. S. 194; reversing *Bolland* v. *Disney*, 3 Russ. 351.

(*k*) Bunyon on Life Assurance, p. 74.

(*l*) *Horn* v. *Anglo-Australian, &c., Co.*, 7 Jur., N. S. 673.

Next, as to conditions in the policy, and herein note;—

Suicide in relation to life assurance.

5. A condition supporting the insurance in the event of the suicide of the assured, he being at the date of the act beneficially interested in the assurance and of sound mind, would be void (*m*).

6. But a condition supporting the insurance in the event of the suicide of the assured, provided that the policy has been properly assigned to a third person and in favour of that assignee or those claiming under him, is not void (*n*).

7. Neither would a condition supporting the insurance in the event of the suicide of the assured being the nominee of the person actually effecting the insurance.

8. Nor a condition supporting the insurance in the event of suicide while under the influence of insanity, and whether the suicide was or was not beneficially interested, be void.

9. On the other hand, a condition avoiding the policy in case the assured should "commit suicide," "die by his own hand," "perish by his own hand," or in whatever equivalent terms the same may be expressed, includes all cases of voluntary self-destruction, whether the person be at the time of the act sane or insane, and whether beneficially interested in the insurance or not so beneficially interested (*o*).

The decisions establishing this last rule of law were not arrived at without much difference of opinion among the judges, and such names of high authority as Tindal, C.J., Pollock, C.B., Alexander, C.B., Tenterden, C.J., Cresswell, J., Wightman, J., and, so far as the term "commits suicide" goes, Erskine, J., may be cited against it. Lord

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(*m*) *Amicable Society* v. *Bolland*, *ubi sup.*, per Lyndhurst, C.

(*n*) *Cook* v. *Black*, 1 Ha. 390; *Moore* v. *Wolsey*, 1 Jur., N. S. 468; cf. *Jackson* v. *Foster*, 5 Jur., N. S. 1247; and see *Solicitors, &c., Co.* v. *Lamb*, 2 De G., J. & S. 251; and though the company be themselves the assignees, *White* v. *British Empire, &c., Co.*, L. R., 7 Eq. 394.

(*o*) *Borrodaile* v. *Hunter*, 5 M. & G. 639; *Clift* v. *Schwabe*, 3 C. B. 437; *Dufaur* v. *The Professional, &c., Co.*, 25 Beav. 599.

Suicide in relation to life assurance.

St. Leonards, too, in referring to the rule marks it with a quære.

Under this condition the plain points for the jury are these :—Did the lunatic die by his own hand? Did he, when he did the act, know that death would be its natural consequences ? (*p*)

It should be added, that many companies now introduce in their policies special provisions in the form of compromises of the claim when the assured commits suicide while in a state of insanity.

32. *Visitors of Charities.*—The visitatorial power, in the case of charities, is exercised by the crown, where the heir of the founder is lunatic (*q*).

Admissibility of evidence of a lunatic.

33. *Witness.*—It is written that insane persons, idiots and lunatics, under the influence of their malady, are utterly incapable of giving evidence (*r*) ; but that they may be witnesses in their lucid intervals, if they have sufficiently recovered their understanding (*s*). The effect of this rule, if construed literally, would be to exclude altogether the evidence of persons suffering from *monomania* or partial insanity, or, in other words, of the larger proportion of inmates of the lunatic houses and asylums in the country. These persons would thus be left to the mercy of their attendants, against whom an act of violence or crime could with the utmost difficulty be established, and the penalties imposed by the legislature upon such acts would be useless (*t*). Happily, a more liberal and rational construction has been adopted by the courts. It is this :—

(*p*) *Borrodaile* v. *Hunter ; Clift* v. *Schwabe, ubi sup.*, p. 379, n. (*o*).

(*q*) *Att.-Gen.* v. *Dixie*, 13 Ves. 519, 533.

(*r*) Co. Litt. 6 b ; Com. Dig. Testmoigne (A), 1 ; Greenl. Evid. i. p. 514 ; Taylor, Evid. p. 1169, ed. 8.

(*s*) Com. Dig. ib. ; Bac. Abr Evidence (A) ; 2 Hale's P. C. 278 ; Leach, Cr. L. 507.

(*t*) Cf. per Lord Shaftesbury before the Select Committee in 1859. Sessions Papers, Evidence, p. 18.

Tests of competence to give evidence.

In dealing with the evidence of the witness, two points are to be considered; first, is the witness capable of knowing that he ought to speak the truth to the best of his ability; secondly, has he the ability truly to report the facts (*u*). The English law, refusing in this particular to be bound by the specific limitations of the civil law, makes the capacity to understand the sanctity of an oath the test that the witness knows that he ought to speak the truth to the best of his ability (*x*). This it is the part of the judge to ascertain. If he is satisfied that the witness understands the nature and obligation of an oath, the witness may be examined. It is for the jury to determine what value is to be assigned to his testimony; and, in order to diminish the assignable value of that testimony, evidence as to the insanity of the witness may be adduced by the other side (*y*).

Evidence by affidavit.

Similarly, where the evidence is taken by affidavit, the mental condition of the deponent must be ascertained by preliminary inquiry, which should be *viva voce;* and the fact of such inquiry having been made, and its result, should be expressed on the jurat, as well as the place in which the affidavit is sworn (*z*). The preliminary inquiry may, it would seem, and indeed should, be made by the ordinary commissioner before the affidavit is sworn. It will be remembered that the witness is liable to be cross-examined on his affidavit.

Habeas corpus to bring up lunatic in confinement.

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in

(*u*) Grotius, De J. B. et P. bk. 2, c. 13, s. 2; Taylor on Evid. p. 1169, ed. 8.

(*x*) *Reg.* v. *Hill*, 5 Cox, C. C. 259; cf. Mr. Shelford's just remarks on this subject; Lun. pp. 621, 622.

(*y*) *Reg.* v. *Hill, ubi sup.*; and cf. *Reg.* v. *Wood and Hudson*, Lanc. Ass. 1869; Lun. Comm. 24th Report (1870), p. 17, before Willes, J. It must be added that juries are indisposed to believe lunatic evidence. Ib. p. 75.

(*z*) *Spittle* v. *Walton*, L. R., 11 Eq. 420.

a cause. The application should be supported by an affidavit, showing that the lunatic is not dangerous, and is in a fit state to be brought up (*a*).

Deaf and dumb.

It should be added, that a person born deaf and dumb is not on that account incompetent as a witness; but if he has sufficient understanding, may give evidence by signs, with the assistance of an interpreter (*b*). If the witness can write, this mode of testimony is preferred (*c*).

Depositions made by one who has become insane.

Where the witness is at the time of the trial so actually insane that he cannot be admitted to give evidence, his depositions previously made in the same matter are in certain cases receivable.

Thus, where the attesting witness to an instrument has become insane, proof of his handwriting to the attestation is admissible (*d*).

Again, the deposition taken before the committing magistrate of a witness who has become insane at the time of the trial, is receivable in evidence (*e*); but the judge must be satisfied that the witness is really insane, and if the incapacity is merely the temporary effect of a bodily cause, the evidence is not admissible (*f*).

Order made.

On an issue being directed, an order will sometimes be made that the parties shall be at liberty to read the depositions of any witnesses examined in the cause who shall be proved to the satisfaction of the court to have been of sound mind at the time of their examination in the cause, but to be at the time of the trial in a state of mental imbecility or incapable of giving testimony (*g*).

Settlement cases.

It does not appear to be settled whether or not the

(*a*) *Fennell* v. *Tait*, 1 Cr. M. & R. 584.

(*b*) *Ruston's case*, Leach, Cr. L. 408; Phillips on Evidence, p. 7; Taylor on Evid. p. 1169, ed. 8.

(*c*) *Morrison* v. *Lennard*, 3 Car. & P. 127.

(*d*) *Bernett* v. *Taylor*, 9 Ves. 381; *Currie* v. *Child*, 3 Camp. 283.

(*e*) *Reg.* v. *Marshall*, 1 Car. & M. 147.

(*f*) Ib.

(*g*) *Jones* v. *Jones*, 1 Cox, 184; *Murley* v. *Templeman*, *cit. ap.* Shelford on Lunacy, p. 621.

examination of a pauper respecting the place of his settlement, taken by two justices when he was sane, can be given in evidence after he has become insane. In a case in 1779, the justices admitted the evidence, subject to the opinion of the Court of King's Bench as to its admissibility, and the judges of that court were divided in opinion (*h*).

(*h*) *Rex* v. *Eriswell*, 3 T. R. 707.

BOOK III.

Of Insanity in relation to Crime.

CHAPTER I.

OF CRIMINAL RESPONSIBILITY (*a*).

Grounds on which the insane stand on a peculiar footing in regard to crime.

WHETHER regard be had to the nature of crime, or to any one of the more justifiable theories of punishment, it will equally appear that the lunatic stands, in relation to criminal acts committed by him, on a different footing to his sane fellow citizens.

Thus, (1) crime is an act punished by the law as voluntary, intentional and malicious (*b*). Insanity implies the absence of will and intention, while it rebuts the ordinary presumption that the act, being forbidden by the law, is malicious and wicked (*c*) ; practical morality condemning those acts only which are done by a person who knows that they are so condemned and has the power of abstaining from them.

(2) The object of punishment being *ut pœna ad unum, metus quum ad eum tum ad omnes perveniat*, this object fails in the case of the insane ; for (a) the motive is only effectual when it acts on an intelligent being capable of remembering that the act about to be committed is wrong,

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(*a*) 1 Russell on Crimes, pp. 113, *et seq.* See Steph. Hist. of Criminal Law of England, vol. ii. c. xix. pp. 124—186, and A General View of the Criminal Law of England by the same author, c. vi.

(*b*) Per Kenyon, C.J., in *Fowler* v. *Padget*, 7 T. R. 514.

(*c*) Cf. the defence in *Dove's case*, *cit. ap.* Stephen's Criminal Law, 394.

contrary to duty, and such as in any well-ordered society would subject the offender to punishment; (b) the punishment is only operative as an example where the cases are parallel, which they are not where the insane suffers for the warning of the sane (*d*).

Test of criminal responsibility.

Accordingly, in a reasonable system of law, that person only will be criminally responsible who, at the moment of committing a criminal act, is capable of remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment (*e*).

In this country.

It is by a reference, such as this, to principles of general morality rather than to the enactments of positive law that the courts of this country have been content to test criminal responsibility in individual cases. That ignorance of the positive law cannot be pleaded as an excuse for crime, is a maxim necessary to the safety of society, and sufficiently near the truth for practical purpose (*f*). It would, therefore, be misleading to raise the issue of capacity or incapacity to know that a particular act is contrary to the law of the land. But a judge may, without fear of misleading, direct the jury that the accused is not responsible for his criminal acts if he has not the mental capacity to know that the particular act is wrong, or, in other words, if he cannot distinguish between right and wrong in regard to the particular act; and this is accordingly the form commonly adopted in practice (*g*).

Issue for the jury.

(*d*) Cf. per Shaw, C.J., in the American case of *Abner Rogers*, 7 Met. 500.

(*e*) Cf. Hale, P. C. 26—30; and *Arnold's case*, 16 How. St. Tr. pp. 764, 765.

(*f*) See 4 Bl. Comm. 27; 1 Hale, P. C. 42; *R.* v. *Barronet*, Dears. 51; *R.* v. *Esop*, 7 C. & P. 456; *R.* v. *Bailey*, Russ. & R. 4.

(*g*) See the opinion of the judges, pp. 386 *et seq.* and the cases there cited; and cf. *R.* v. *Vaughan*, 1 Cox. C. C. 80, per Tindal, C.J.; *R.* v. *Higginson*, 1 C. & K. 129; *R.* v. *Davies*, 1 F. & F. 69; *R.* v. *Richards*, ib. 87; *R.* v. *Stokes*, 3 C. & K. 185; *R.* v. *Barton*, 1 F. & F. 666; *R.* v. *Brough*, 2 F. & F. 838; *R.* v. *Layton*, 4 Cox, C. C. 149; *R.* v. *Law*, 2 F. & F. 836; *R.* v. *Leigh*, 4 F. & F. 915; *R.* v. *Southey*, 4 F. & F. 864; *State* v. *De Rancé*, 44 Amer. R. 426 (U.S.), cf. also 1 Hale, P. C. 26, 30; Alison's Criminal Law of Scotland, p. 654; Steph., A General View of the Criminal Law of England, p. 78.

Delusion, how far an excuse for a criminal act.

The incapacity may arise either from simple want of intelligence or from its perversion; and in the latter case, whether that perversion is general or particular. The existence of delusion may indeed operate as an excuse for a criminal act in one of two modes. Either the delusion

i. As a delusion proper.

is such that the person under its influence has a real and firm belief in some fact not true in itself, but which, if true, would excuse his act,—as, where the belief is that the party killed had immediate designs upon his life; or, again, that the act is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing he is doing by the command of a superior power which supersedes all human laws and the laws of nature.

ii. As being attended with frenzy.

Or, secondly, this state of delusion indicates to an experienced person that the mind is in a diseased state, that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in acts of homicide or other violent acts towards friend or foe indiscriminately, so that, although there were no previous indications of violence, yet the subsequent act connecting itself with the previous symptoms and indications will enable an experienced person to say, that the outbreak was of such a character that for the time being it must have overborne memory and reason; that the act was the result of disease and not of a mind capable of choosing—in short, that it was the result of uncontrollable impulse (*h*), and not the act of a person influenced by motives (in the usual sense of the word) and governed by the will (*i*).

Answers of the judges in *Macnaughten's case.*

The preceding remarks, which are chiefly based on the charge of an eminent American judge, Chief Justice Shaw (*k*), are in almost verbal agreement with the answer

(*h*) It will be observed that the uncontrollable impulse is coupled with the mental disease; as to uncontrollable impulse per se, vide infra, p. 391.

(*i*) Cf. *R.* v. *Townley*, 3 F. & F. 846, per Martin, B.

(*k*) See *Abner Rogers' case*, 7 Met. 500.

delivered by Tindal, C.J., as the unanimous opinion of all the judges except Mr. Justice Maule, to certain questions put to them by the House of Lords in *Macnaughten's case* (*l*). It will be noticed that the answers are particularly confined to cases of partial delusion.

Partial insanity.

How far admitting criminal responsibility.

Question 1 was: "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons? as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit."

In answer to this question, assuming that their lordships' inquiries were confined to those persons who labour under such partial delusions only, and are not in other respects insane, the judges were of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed if he knew at the time of committing such crime that he was acting contrary to law, by which expression they understood their lordships to mean the law of the land.

Questions to be submitted to the jury in such a case

Question 2 was: "What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a

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(*l*) *Macnaughten's case*, 8 Scott, N. R. 600—603. The answer of Maule, J., so far as it went, did not differ materially from that of the other judges, but it was expressed with more diffidence and at less length from the difficulty which he felt of answering the questions because they did not arise out of, and were not put with reference to, a particular case or for a particular purpose, which might limit or explain the generality of their terms.

crime,—murder, for instance, and insanity is set up as a defence?"

Question 3. "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Answers of the judges in *Macnaughten's case.*

These questions were answered together, the opinion of the judges being that the jury ought to be told in every case that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions had generally been, whether the accused, at the time of the doing of the act, knew the difference between right and wrong (*m*), which mode, though rarely if ever, leading to any mistake with the jury, was not, the judges conceived, so accurate when put generally and in the abstract as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged.

Issue for the jury.

If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the

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(*m*) So, by Tracey, J., in *Arnold's case*, 16 St. Tr. 764; *R.* v. *Lord Ferrers*, 19 St. Tr. 947; Le Blanc in *Bowler's case*, *cit. ap.* Shelf. on Lun. p. 590; Lord Mansfield, C.J., in *Bellingham's case*, ib. 592; Lord Lyndhurst, C.B., in *R.* v. *Offord*, 5 C. & P. 168; Lord Denman, C.J., 9 C. & P. 547; and comp. *Clift* v. *Schwabe*, 3 C. B. 475; *Borrodaile* v. *Hunter*, 5 M. & Gr. 639; and *Dormay* v. *Borrodaile*, 5 C. B. 380; and so, in his separate answer to the questions of the House of Lords, Maule, J., said: "To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness of mind should, according to the law, as it has been long held and understood, be such as to render him incapable of knowing right from wrong."

law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was expected in order to lead to a conviction, whereas the law is administered on the principle that every one must be taken conclusively to know it without proof that he does not know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong.

This course they thought correct, accompanied with such observations and explanations as the circumstances of each particular case might require.

How far an insane delusion as to facts an excuse.

Question 4 was: "If a person under an insane delusion as to facts commits an offence in consequence thereof, is he thereby excused?"

To which the judges replied that the answer must, of course, depend on the nature of the delusion: but making the same assumption as before, namely, that he labours under such partial delusions only, and is not in other respects insane, they thought he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment (*n*). If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment (*o*).

When the act warranted by the delusion.

When not.

Summing up of the rules.

The result of the whole matter appears, then, on the

(*n*) So, per Martin, B., in *R.* v. *Townley*, 3 F. & F. 846.

(*o*) So, per Lord Mansfield, C.J., in *Bellingham's case*, *cit. ap.* Shelf. on Lun. pp. 591, 592; and per Martin, B., in *R.* v. *Townley*, 3 F. & F. 838, 848.

Acts during a lucid interval.

Acts which the lunatic knows to be wrong.

Acts not justified by the delusion even if true.

Acts justified by the delusion if true.

foregoing authorities, to be this: (1) acts which if committed by a sane man would be criminal, are, if committed by a lunatic during a lucid interval, equally criminal and liable to the same punishment; (2) such acts if committed by a lunatic under circumstances which show that at the time he was conscious of the difference between good and evil, and that the act which he was contemplating was wrong, are also criminal in the same sense as if he were sane and liable to the same punishment; (3) such acts, if committed under an insane delusion as to the relations between the accused and the injured party or the injured party and the public, or as to other like matter, will not be excused by the existence of the delusion, provided that the supposed facts, if real, would not have justified the acts; and (4) will be excused in the alternative case.

Qu. the case of malice *ab initio.*

A question which was raised by an argument of Lord Erskine, then solicitor-general, in his defence of Hadfield, when charged with shooting at King George the Third in Drury Lane Theatre in 1800, and which has never, so far as the author is aware, received a judicial answer, is the following:—Suppose a lunatic destroys a man under the belief that he is in a potter's vessel, but still with the design of inflicting a malicious injury on the property of a third person whom he believes to be the owner of the vessel, could he in such a case be convicted of murder? (*p*)

Lord Erskine, of course, argued that he could not, but it seems very doubtful whether he was right if one may rely on the analogy of the cases in which the malice is held, as it has been sometimes expressed, *egredi personam* (*q*).

Critical time.

It has been stated that, strictly, insanity at the moment of committing the act in question should be proved (*r*). This, however, said Lord Kenyon, C.J., in *Hadfield's*

(*p*) 27 Howell's St. Tr. p. 1281.

(*q*) Cf. Stephen's History of Criminal Law of England, vol. ii. c. xix.

(*r*) See the argument of the Attorney-General in *Parker's case*, *cit. ap.* Shelford on Lunacy, p. 590; so also in *R.* v. *Stokes*, 3 C. & K. 185; per Rolfe, B., citing a similar opinion of Alderson, B.

case, would be to run into a nicety, and where the prisoner is proved to be deranged immediately before the act, and there is no reason for believing him to have become in the interval a rational and accountable being, he ought to be acquitted (*s*).

Inadequacy of motive and irresistible impulse.

At the same time, it should be remembered that in *Hadfield's case* the madness of the accused previous to the act was irresistibly proved; when this is not the case, it seems that the doctrine above stated must apply; and further, that unless delusion, so often referred to as the real test of insanity, has been proved to exist, the apparent absence or inadequacy of motive for the act, or the presence of so-called uncontrollable impulse, is not to be accepted as proving insanity (*t*). "It would be a most dangerous doctrine to lay down," said Rolfe, B., in *R.* v. *Stokes* (*u*), "that because a man committed a desperate offence with the chance of instant death and the certainty of future punishment before him, he was, therefore, insane, as if the perpetration of crimes was to be excused by their very atrocity." And in *R.* v. *Haynes* (*x*), Bramwell, B., expressed himself in a similar manner. After reading the opinion of the judges in *Macnaughten's case* to the jury, he continued, "It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But the circumstances of an act being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might

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(*s*) *Hadfield's case*, 27 Howell, St. Tr. 1281; and conf. in *R.* v. *Layton*, 4 Cox, C. C. 149, per Rolfe, B., and *R.* v. *Law*, 2 F. & F. 836.

(*t*) Cf. Casper, For. Med. pt. vi. s. 61; *People* v. *Hoin*, 45 Amer. R. 651 (U.S.).

(*u*) *R.* v. *Stokes*, 3 C. & K. 185; but see Stephen's Hist. of Crim. Law of England, vol. ii. c. xix.

(*x*) *R.* v. *Haynes*, 1 F. & F. 666, and conf. *R.* v. *Brough*, 2 F. & F. 838, note; *Reg.* v. *Higginson*, 1 C. & K. 129.

Inadequacy of motive and irresistible impulse.

prompt the act. A morbid and restless but resistible thirst for blood, would itself be a motive urging to such deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint, that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine—did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong" (*y*). Finally, Parke, B., in *R.* v. *Barton*, after signifying his adhesion to the views of Rolfe, B., on uncontrollable impulse, said, it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion (*z*).

Dogmatic theories of irresponsibility.

Not less unsatisfactory is that theory of criminal responsibility which is constructed on special axioms regarding the mental conditions of persons in particular states of physical disorder; such, for example, as that pregnant women, women in childbed, deaf mutes, epileptics, and the like being disposed to insanity, the proof of the physical state is conclusive to establish irresponsibility. All these conditions—pregnancy, childbed, epilepsy, and the rest—may become occasional causes of mental disturbance. Should such disturbance be alleged to have occurred, then it must of itself be inquired into and determined (*a*).

Rules for a diagnosis of criminal responsibility.

It may be convenient to state briefly here the points to which, in the judgment of the great German authority on

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(*y*) Vide ante, p. 385, and cf. Steph. Hist. of the Criminal Law of England, vol. ii. c. xix.

(*z*) *R.* v. *Barton*, 3 Cox, C. C. 275, and comp. *R.* v. *Burton*, 3 F. & F. 772, 780, per Wightman, J.

(*a*) Casper, For. Med. pt. vi. s. 58.

forensic medicine, Professor Casper, attention should be drawn, in order to arrive at a correct diagnosis of criminal responsibility (*b*).

Rules for a diagnosis of criminal responsibility.

1. Is the deed an isolated act? Is it one that might have been expected of the culprit?

2. Was there a motive for the deed? But, in estimating the value of this inquiry, it must be remembered—

(a.) That motives vary infinitely with different individuals;

(b.) That, therefore, disproportion between the assignable motive and the act is not conclusive of irresponsibility. The trifling character of the *causa facinoris* may be just as striking a proof of the monstrous criminality, the extrordinary atrocity of the culprit, as it may under other circumstances be of his irresponsibility.

3. Has the culprit acted according to a regular plan? But proof of premeditation and contrivance is not conclusive of responsibility, any more than proof of their absence establishes irresponsibility.

4. Has the culprit taken measures to avoid the punishment due to his deed? and if so, were these measures taken before or after the deed itself?

5, 6. Is there repentance, and is there remembrance of the deed on the part of the culprit? These inquiries are of little value. Repentance and absence of remembrance are easily simulated, and the former is as frequent in the insane as in the sane.

7. What was the degree of intelligence possessed by the accused?

8. Hallucinations, *e.g.*, voices saying "Thou must do it," though constantly simulated, may yet in some cases be relied upon to establish irresponsibility. Inquire, (1) whether hallucinations existed before and independently of the act in question; (2) whether the act has been

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(*b*) Casper, For. Med. pt. vi. s. 61.

carried out solely from a delusionary point of view and no other.

Observations on the above.

No one of the circumstances suggested by the foregoing inquiries will probably, if taken alone, conclude the question of responsibility or irresponsibility. But these inquiries will lead to the disclosure of facts of importance in its solution; and that frequently in an opposite sense to that which *primâ facie* might have been anticipated. For example, contrivance may be shown (3); or measures to evade punishment may have been taken (4); and yet in that contrivance or those measures there may be circumstances which irresistibly lead to the conviction of mental disorder existing throughout. On the other hand, hallucinations may prove to be but the externalization of motives of avarice or jealousy, which the culprit was alike bound and able to resist and subdue.

Simulation.

A few remarks, based on the treatise of the same eminent author, on the subject of the simulation of mental disease, may be added (*c*).

Simulation may be suspected—

Indications.

1. When the accused continually declares that he is insane (*d*).

2. When, though unable to answer questions relating to the crime, the accused can remember accurately other facts.

3. When the accused has no answer to make to any question important or unimportant beyond, it may be, a reference to the weakness of his head.

4. When there is inconsistency in the indications of insanity, *e.g.*, manifestation at one time of *mania*, at another of *dementia* (*e*).

5. When there is great variety in the delusions manifested from time to time.

(*c*) Casper, For. Med. pt. vi. s. 67.

(*d*) See the observations on insanity in the introduction, and cf. the note of a learned judge cited in Taylor's Med. Jur. 2, 494, 495.

(*e*) Taylor, Med. Jur. 2, 494 *et seq.*

Indications of simulation.

6. From the sudden assumption of irrationality on the conversation taking a hazardous turn.

7. When the statements as to the origin and cause of the alleged mental disease are inconsistent with experience.

8. When the alleged attacks of insanity occur only at convenient times for the accused, especially when a specified attack has preceded the commission and detection of crime. "No one feigns insanity merely to avoid suspicion" (*f*).

To which may be added—

9. General incapacity to carry out the part. A maniacal patient has powers of endurance, of dispensing with sleep, &c., which a sane person has not. An insane person of unclean habits is unclean everywhere, an impostor will usually spare his person (*g*).

(*f*) Taylor, Med. Jur. 2, 494. But the commission of crime may occasion insanity, ib. 509; Pagan, Med. Jur. of Ins. 82.

(*g*) Taylor, Med. Jur. 2, 496 *et seq.*; Ann. d'Hyg. 1867, 2, 430.

CHAPTER II.

PRACTICE WHERE INSANITY THE DEFENCE.

Plea of insanity.

THE plea of insanity may be raised on behalf of an accused person, although he himself persist in denying the fact, and is permitted to call witnesses to prove his sanity (*a*).

Not raised before the grand jury, but on trial.

The question of insanity is not properly raised by the grand jury, who have no authority at law to ignore a bill on that ground, though it appear clearly by the evidence of witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane. If they believe that the acts, if done by a sane person, would have amounted to murder, it is their duty to find the bill, otherwise, as has been said, the person cannot be detained during the pleasure of the crown (*b*).

Common law, power to detain a prisoner acquitted on the ground of insanity.

Statutory power.

It is alleged that, independently of statutory enactment, the court before which a person was tried and acquitted on the ground of insanity had the power to direct him to be detained in safe custody. This course is now, however, authorized by statute; and accordingly, if, upon the trial for treason, murder or felony (*c*), or any misdemeanour (*d*), insanity at the time of committing the offence is given in evidence, and the jury acquit the accused, they must be required to find specially whether he was insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the

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(*a*) *R.* v. *Pearce*, 9 C. & P. 670.

(*b*) *R.* v. *Hodges*, 8 C. & P. 195.

(*c*) 39 & 40 Geo. 3, c. 94, s. 1; and for Ireland, see 1 & 2 Geo. 4, c. 33, ss. 16, 17; 1 & 2 Vict. c. 27; 8 & 9 Vict. c. 107, ss. 10, 11; 46 & 47 Vict. c. 38.

(*d*) 3 & 4 Vict. c. 54, s. 3; and see *R.* v. *Little*, Russ. & R. C. C. 430; 46 & 47 Vict. c. 38.

affirmative, the court may order him to be kept in safe custody until the crown's pleasure be known.

Prisoner must have been acquitted on the ground of insanity.

It should be noticed that the finding of the jury that the accused person is or was insane, is not in itself sufficient to introduce the operation of the statute. They must find specially that he was acquitted on the ground of insanity. Hence, in a case where, on an indictment for treason, which stated as an overt act that the prisoner discharged a pistol loaded with powder and a bullet, the jury found that the prisoner was insane at the time when he discharged the pistol, but whether the pistol was loaded with ball or not there was no satisfactory evidence, the court expressed a strong opinion that the case was not within 39 & 40 Geo. 3, c. 94, s. 1 (*e*).

Consequences of a prisoner becoming insane after the act.

Passing to the cases in which insanity has arisen since the criminal act, we read that if a man in his sound memory commits a capital offence, and before arraignment for it becomes mad, he ought not to be arraigned for it (*f*); because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound mind, he might have alleged something in stay of judgment or execution (*g*).

(*e*) *R.* v. *Oxford*, 9 C. & P. 525.

(*f*) It is stated in the books, that if a person of non-sane memory commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to goal, there to remain in expectation of the king's grace pardoning him. 26 Ass. 27, 3 Edw. 3, Corone, 351. Hale, however, adds, that in this case (as in that of treason or murder) it is prudence to swear an inquest *ex officio* touching his madness, whether it was feigned. 1 Hale, P. C. 35.

(*g*) 1 Hale, P. C. 34; 4 Bl. Comm. 25; *Frith's case*, 22 St. Tr. 307; and conf. *R.* v. *Southey*, 4 F. & F. 864, and 872, n. (*a*).

An exception to this humanity appeared, indeed, for awhile on the statute book, it having been enacted by the statute 33 Hen. 8, c. 20, that if a person being *compos mentis* should commit high treason and after fall into madness, he might be tried in his absence and should suffer death as if he were of perfect memory. This act was, however, repealed by the statute 1 & 2 Ph. & M. c. 10, and with justice, for, as is observed by Sir E. Coke, the execution is for example, *ut pœna ad paucos, metus ad omnes perveniat:* but so it is not when a madman is executed, but should be a miserable spectacle both against law and of extreme inhumanity and cruelty, and can be of no example to others (*h*).

33 Hen. 8, c. 20.

1 & 2 Ph. & M. c. 10.

How insanity at the trial decided.

By the common law, if it be doubtful whether a criminal, who is at his trial is in appearance a lunatic, be such in truth, or not, the fact must be investigated (*i*). It appears that it may be tried by the jury who are charged to try the indictment (*k*), by an inquest of office to be returned by the sheriff of the county wherein the court is sitting (*l*); or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter* in the nature of an inquest of office (*m*).

Statutory procedure.

The rules to be followed in such cases have, however, been further defined by successive statutes, as the result of which it appears that if a person charged with any offence, be it felony or misdemeanour, on being brought up to be discharged for want of prosecution or on being arraigned under the indictment, appear to be insane (*n*), the court may order a jury to be impannelled to try the insanity, and,

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(*h*) 3 Inst. 6.

(*i*) 1 Hawk. P. C. Bk. I. c. 1, s. 4.

(*k*) 1 Hale, P. C. 33, 35, 36; 1 Hawk. P. C. c. 1, s. 4, n. 5.

(*l*) 1 Hawk. P. C. Bk. I. c. 1, s. 4; 1 And. 107; 1 Sav. 50, 56; 1 Hale, P. C. 35.

(*m*) Fost. 46; Kel. 13; 1 Lev. 61; 1 Sid. 72; and the proceeding by inquest *ex officio* is recommended in cases of importance, doubt and difficulty. 1 Hale, P. C. 35; 1 Sav. 56; 1 And. 107; see 1 Hawk. P. C. c. 1, s. 4, n. 5.

(*n*) 39 & 40 Geo. 3, c. 94, s. 2; *R.* v. *Davies*, 6 Cox, C. C. 326; 46 & 47 Vict. c. 38.

if they find him insane, the court may order him to be kept in custody until the pleasure of the crown is known (*o*).

Jury may form their judgment from inspection.

On this inquiry it further appears that the jury may form its opinion as to the state of the accused person's mind from his demeanour while the inquest is being taken, and may thereupon find him to be insane without any evidence being given as to his present state; and that it is unnecessary to ask him whether he will cross-examine the witnesses or offer any remarks on evidence, as this would be a useless prolongation of a painful proceeding (*p*).

Test of insanity for this purpose.

The points for the jury's consideration in such a case seem to be, whether the prisoner has sufficient intellect to comprehend the course of the proceedings so as to make a proper defence, to challenge any juror he may wish to object to, and to comprehend the details of evidence.

Time to plead insanity at trial.

The proper time to make the suggestion of the incapacity of the accused to plead is before he has actually pleaded. There is, however, a statement in the books to the effect that where the lunatic happens by some oversight or by means of the gaoler to plead to his indictment and is put upon his trial, if it appear to the court upon the trial that the accused is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, "especially in case any doubt appears upon the evidence touching his guilt, and this *in favorem vitæ*." If, it is continued, there be no colour of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the acts committed, then it is fit that the trial proceed in order to his acquittal (*q*).

(*o*) 39 & 40 Geo. 3, c. 94, s. 2; 46 & 47 Vict. c. 38; *R.* v. *Little*, R. & R. C. C. 430. The insanity of a person at or subsequently to his arrest is no ground for discharging him on common bail; nor will bail be discharged on the ground of the insanity of their principal. *Watt* v. *Verney*, 4 T. R. 121; *Kernot* v. *Norman*, 2 T. R. 390; *Ibbotson* v. *Galway*, 6 T. R. 133; cf. *Steel* v. *Alan*, 2 Bos. & Pull. 362.

(*p*) *Reg.* v. *Goode*, 7 A. & E. 536.

(*q*) *R.* v. *Pritchard*, 7 Car. & P.

Exceptional case.

In a recent case, where the trial had been begun, and it would have been manifestly inconvenient then to recommence the trial of the collateral issue, and as, moreover, it appeared that the evidence as to the prisoner's sanity at the time of arraignment was very much mixed up with the question of his insanity generally, Mellor, J.,[303] held that it was open to the court under 39 & 40 Geo. 3, c. 95, to take the whole of the evidence and then leave to the jury both questions, as to the prisoner's sanity at the time of the act, and at the time of the trial (*r*).

Ordinarily the prisoner is mute.

Questions for the jury.

In ordinary cases the prisoner who is insane at the time of his arraignment stands mute, and the usual course then has been to put three points to the jury, viz.: 1st, whether the prisoner is mute of malice or not; 2nd, whether he can plead to the indictment or not; and 3rd, whether he is of sufficient intellect to comprehend the course of proceedings (*s*).

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303. In *Turner's case*, cit. ap. Shelford on Lunacy, 597, the jury were sworn to try "whether the prisoner is insane by visitation of God, or whether of deceit and covin he counterfeits insanity." In *R.* v. *Goode*, 7 A. & E. 536, "whether J. H., the defendant, be insane or not."

(*r*) *Reg.* v. *Southey*, 4 F. & F. 864, 872 *et seq.*, and particularly 872, n. (*a*).

(*s*) *R.* v. *Pritchard*, 7 C. & P. 303; *R.* v. *Dyson*, ib. 305, n.; see *Thompson's case*, 2 Lewin, 137; *R.* v. *Whitfield*, 3 C. & K. 121; *R.* v. *Israel*, 2 Cox, C. C. 263.

CHAPTER III.

OF SPECIAL OFFENCES RELATING TO THE INSANE.

The common law principle.

At common law the taking into custody or detention and restraint of any person can only be justified by showing that the person is in fact of unsound mind and dangerous to himself or others. A supposition that a person is a lunatic, even if supported by an allegation that he so acted as to appear one, is no justification. Everyone, therefore, who, not being protected by express statutory enactment, takes any part in the control of a person as a lunatic, has the burden thrown upon him of proving that the person was a dangerous lunatic (*a*).

Nor is the plain application of this rule to be evaded by any quibble arising from the want of will for or against the control on the part of the person confined. As Cleasby, B., said in one case,—"To lock a person in a room, though not against his will, yet without his consent, is false imprisonment" (*b*).

Medical men.

Medical men may justify control exercised or directed by them in cases of insanity or *delirium tremens*, by showing that such control was reasonably necessary either to cure the patient or to restrain him from doing mischief to himself or others (*c*). So, by merely signing a certificate under the Lunacy Act, they do not render themselves liable

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(*a*) Bac. Abr. tit. Idiot (C); Com. Dig. tit. Pleader, 3 M. 22; Bro. Abr. tit. Faux Imprisonment, pl. 28; *Fletcher* v. *Fletcher*, 1 E. & E. 420; *Scott* v. *Wakem*, 3 F. & F. 328; *Anderdon* v. *Burrows*, 4 Car. & P. 210, which was an action for trespass.

(*b*) *Reg.* v. *Smith*, York Summer Assizes, 1869, Lun. Comm. 24th Rep. (1870), p. 62.

(*c*) *Scott* v. *Wakem*, 3 F. & F. 328; *Symm* v. *Fraser*, 3 F. & F. 859.

Medical men.

to an action (*d*), although they are not within the express provision of the statute (*e*). But they are bound to take due care and make due inquiries, particularly if not satisfied on their personal examination; nor does the fact that they have acted *bonâ fide* diminish their liability (*f*).

Any person who makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under the Lunacy Act, is guilty of a misdemeanour. And any person who makes a wilful misstatement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under the act, is guilty of a misdemeanour (*g*).

Person signing reception order.

Again, the person signing the reception order is protected, if he acts with good faith and reasonable care, and any proceeding taken against him may be stayed on summary application (*h*). That person would never have been obliged to show the whole common law justification of detention, or establish that the person was a dangerous lunatic. It would have always been sufficient to show that the person was what the order described him as being, and a proper person for confinement (*i*).

Proprietors, superintendents, &c

The other persons whom the legislature has interfered to protect, as well in the interest of lunatics as of themselves, are the managers of institutions for lunatics, masters of workhouses, and persons in whose charge the lunatic was as a single patient, their officers and servants. To these persons the reception order, if in due form, affords a complete justification for taking, confining, de-

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(*d*) *Chawner* v. *Warburton*, K. B., July, 1813; see Annual Register, 1813, p. 284; *Hall* v. *Semple*, 3 F. & F. 337.

(*e*) In *Fletcher* v. *Fletcher* (1 E. & E. 420), Wightman, J., seems to have thought medical men were included. In any case it is a moot question how far the signing of a certificate is a "thing done under this act," within the meaning of 53 Vict. c. 5, s. 331, which limits the actions within its scope to twelve months.

(*f*) *Hall* v. *Semple*, 3 F. & F. 337.

(*g*) 53 Vict. c. 5, s. 317; *Reg.* v. *Ogilvie*, C. C. C. 1872.

(*h*) 53 Vict. c. 5, s. 330.

(*i*) *Fletcher* v. *Fletcher*, 1 E. & E. 420, *et ubi supra*, n. (*e*). See 53 Vict. c. 5, ss. 12, 35, 85, 330.

taining and (for fourteen days after an escape) retaking the person to whom it refers (*k*). It is not necessary to aver that the person was a lunatic, or to be at any pains to establish the fact. The documents may be relied on by themselves (*l*). Proprietors, superintendents, &c.

But the documents must be absolutely formal; every particular of the requirements of the act must have been complied with. Otherwise (1) the person receiving the alleged lunatic, whether in fact he be a lunatic or not, is guilty of an offence against the Lunacy Act, and may be indicted for a misdemeanour or fined (*m*). Consequences of informality.

And (2) he is liable to an action by the party confined, in defending which he will have to fall back upon the common law justification, and show the existence of dangerous lunacy (*n*).

Persons who consider themselves to have been unjustly confined are on their release entitled to require a copy of the reception order and the certificates upon which they have been confined, which must be furnished to them or their solicitors by the secretary to the commissioners without fee (*o*). Protection of persons improperly confined.

The plaintiff in an action for illegal detention or injury in a lunatic asylum is entitled to inspection of the books kept by the owner or superintendent so far as they relate to himself, as well as of letters written to either of them in regard to him by his friends or the commissioners in lunacy (*p*). The only reply, apparently, to a demand for such inspection would be an affidavit that production would expose the defendant to an indictment, a reply which no keeper of a lunatic asylum would be likely to avail himself of.

(*k*) 53 Vict. c. 5, ss. 35, 85.

(*l*) *Norris* v. *Seed*, 3 Exch. 782; *Reg.* v. *Pinder*, 24 L. J., N. S., Q. B. 148; *Mackintosh* v. *Smith*, 4 Macq., H. L. C. 913; see also *R.* v. *Harris*, 10 Cox, C.C. 541.

(*m*) 53 Vict. c. 5, s. 315; *Re Shuttleworth*, 9 Q. B. 651.

(*n*) *Fletcher* v. *Fletcher*, 1 E. & E. 420, *et ubi supra*.

(*o*) 53 Vict. c. 5, s. 82.

(*p*) *Hill* v. *Philp*, 7 Exch. 232.

Constables, relieving officers, &c.

The remarks already made as to the necessity in dealing with lunatics or alleged lunatics of adhering strictly to the procedure directed in the Lunacy Act, apply equally to the cases of constables, relieving officers, and overseers. If any of these persons interfere with the liberty of anyone in any manner not warranted by that act, he makes himself at once liable to an action at the suit of that person; and unless he can show that his interference was necessary for the safety of the person, himself or others, and that the circumstances of the case did not admit of an immediate application of the strict procedure, the verdict must be against him.

In two cases this event followed in actions against parish officers for removing alleged lunatics to the lunatic ward of the workhouse, instead of having recourse to a justice (*q*).

(*q*) *Elliot* v. *Allen* and *Turk* v. *Barker*. The facts of the former case will be found under *Att.-Gen.* v. *Pearson*, 10 Jur. 651; see also *Elliot* v. *Allen*, 14 L. J., N. S., C. P. 136.

CHAPTER IV.

ABUSE AND ILL-TREATMENT OF THE INSANE.

Common law rule.

At common law the insane stand upon the same footing as the sane in respect of the remedy for abuse and ill-treatment; save only that the restraint, which is necessary in their case for their own protection and that of others, may be justified. Such restraint must be kept within the limits of strict necessity, and where greater in degree, more severe in character, or longer in duration than is necessary for the security and care of the lunatic, it is an offence at common law, punishable by indictment (*a*).

Statutory enactment.

The abuse, ill-treatment or wilful neglect of a lunatic by any person having in any sense the charge of him has been made a misdemeanour by statute, rendering the offender liable to indictment or, in some cases, to a pecuniary fine not exceeding 20*l.* (*b*).

Under the express provision of the acts are:—

1. Managers, officers, nurses, attendants, servants or other persons employed in an institution for lunatics (*c*), or workhouse (*d*).
2. Any attendant of any single patient (*e*).
3. Any person having the care or charge of any single patient (*f*).

The third class includes cases in which the care or charge is only taken in the ordinary way, and as it would be whether there were lunacy or not, as, *e.g.*, where a lunatic

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(*a*) *Roberts' case, cit. ap.* Comm. Rep. 1854, p. 38.

(*b*) 53 Vict. c. 5, ss. 322, 324, 328. The fine must not be less than 2*l.*

(*c*) 53 Vict. c. 5, ss. 322, 323, 324.

(*d*) Ib.

(*e*) Ib.

(*f*) Ib.

wife is kept by her husband, or a lunatic child by his parents (*g*). Formerly the cases of persons in domestic custody were left to the common law (*h*).

At the same time this exception was not strained, and if a man voluntarily took upon himself the charge of another who would not ordinarily be under his care, as, *e.g.*, a lunatic brother, and then wilfully neglected him, he was indictable for a misdemeanour under the statute (*i*).

Statutory offences, how prosecuted.

A secretary of state on the report of the commissioners or visitors of any institution for lunatics may direct the Attorney-General to prosecute on the part of the Crown any person alleged to have committed a misdemeanour under the Lunacy Act, 1890 (*k*).

Offences under 53 Vict. c. 5, ss. 322 and 324, may be prosecuted by the secretary of the commissioners by their order (*l*); by the clerk of the visitors of any licensed house for an offence committed within their jurisdiction; by the clerk of the visiting committee of an asylum for any offence by any person employed therein (*m*).

Constables, relieving officers and overseers are directed by 53 Vict. c. 5, s. 13, to give notice to a justice specially appointed under that act of supposed lunatics who are not under proper care and control, or are cruelly treated or neglected by any relative or person having charge of them.

(*g*) *Buchanan* v. *Hardy*, 18 Q. B. D. 486.

(*h*) *Reg.* v. *Rundle*, 1 Dears, C. C. 482; *Reg.* v. *Pelham*, 8 Q. B. 959; failed on technical grounds. See also *R.* v. *Smith*, 2 Car. & P. 449; *R.* v. *Smith*, 14 Cox, 398.

(*i*) *Reg.* v. *Porter*, 33 L J., N. S., M. C. 126; cf. *Roberts' case* and *Luxmore's case*, Comm. Rep. (1854), pp. 38, 39; contract, *R.* v. *Smith*, 2 C. & P. 449. Juries are always unwilling to convict. *Reg.* v. *Vollans*, York Spring Assizes, 1873; Comm. Rep. (1874), p. 74; *Cadman's case*, ib. 75; *R.* v. *Smith*, 14 Cox, 398.

(*k*) 53 Vict. c. 5, s. 328.

(*l*) For a few examples of these prosecutions, see *Reg.* v. *Lightfoot*, *Reg.* v. *North*, *Reg.* v. *Black*, Comm. Rep. (1870), pp. 64 *et seq.*; *Reg.* v. *Davy* (1871), p. 78.

(*m*) 53 Vict. c. 5, s. 325.

BOOK IV.

Of the Law of Evidence in relation to Insanity.

CHAPTER I.

OF THE PRESUMPTIONS RELATING TO SANITY AND INSANITY.

General presumption of sanity.

1. EVERY man is presumed by the law to be sane until he is proved to be or to have been insane (*a*).

Reason being the common gift of man raises the general presumption that every man is in a state of sanity, and that insanity ought to be proved; and in favour of liberty and of that dominion which by the law of nature men are entitled to exercise on their own persons and properties, it is a presumption of the law of England that every person who has attained the usual age of discretion is of sound mind until the contrary is proved, and this holds in civil as well as in criminal cases (*b*).

In regard to grant of probate and the establishment of wills.

In regard to wills, however, it has been held to be the paramount duty of the executor, or other person relying on it, to show the will to be the act of a competent testator; and, therefore, though in the absence of doubt and dispute the presumption in favour of sanity would answer the purpose of proof, where doubt or dispute exists it is not enough for him to rest on the presumption, but the

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(*a*) 1 Hale, P. C. 33; Butler, Co. Litt. 246 b, n. (1); *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443; *White* v. *Wilson*, 13 Ves. 88; *Steed* v. *Calley*, 1 Keen. 620; *Snook* v. *Watts*, 11 Beav. 105; *Creagh* v. *Blood*, 8 I. E. R. 434; *Macnaughten's case*, 8 Scott, N. R. 600; Swinb. Wills, pt. ii. s. 3; Greenleaf on Evid. vol. i. s. 42; vol. ii. ss. 373, 689, 690.

(*b*) 1 Hale, P. C. 33; *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443; *Steed* v. *Calley*, 1 Keen, 620.

capacity of the testator must be proved affirmatively. The burden of proof which always rests on those who set up a will is considerably increased when it appears that the testator was subject to delusions (*c*). The same would seem to be true in an action to establish a will against the heir at law (*d*). Similarly, too, when a duly-executed will is alleged to have been revoked, it is incumbent on the person making the allegation to show the competence of the testator to revoke it (*e*).

Establishment of will.

Revocation of will.

2. Insanity once proved or admitted to have existed is presumed to continue until it is proved to have ceased (*f*); and accordingly the burden of proof attaches to the party who alleges a lucid interval or recovery (*g*). Moreover, proof less strong than would suffice to establish insanity at the critical period will shift the *onus probandi*, *e.g.*, that

Presumption of continuance of insanity.

(*c*) *Sutton* v. *Sadler*, 3 C. B., N. S. 87; *Symes* v. *Green*, 1 Sw. & Tr. 401; *Smee* v. *Smee*, 5 P. D. 84.

(*d*) *Harris* v. *Ingledew*, 3 P. Wms. 93; *Wallis* v. *Hodgeson*, 2 Atk. 56; *Ogle* v. *Cooke*, 1 Ves. 178; *Townsend* v. *Ives*, 1 Wils. 216; *Bootle* v. *Blundell*, 19 Ves. 500; *Tatham* v. *Wright*, 2 Russ. & M. 13—15.

(*e*) *Harris* v. *Berrall*, 1 Sw. & Tr. 153; *Sprigge* v. *Sprigge*, L. R., 1 P. & D. 608; *Benson* v. *Benson*, L. R., 2 P. & D. 172, 176.

(*f*) Butler, Co. Litt. 246, b. n.; *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443; *White* v. *Wilson*, 13 Ves. 88; *Frank* v. *Mainwaring*, 2 Beav. 115; *Snook* v. *Watts*, 11 Beav. 105, 107; *Hassard* v. *Smith*, 6 Ir. Rep., Eq. 429; Swinb. pt. ii. s. 3, pl. 7; Godolphin, pt. i. c. 8, s. 2; *Prinsep* v. *Dyce Sombre*, 10 Moo. P. C. 232, 239, 244, *et seq.*; *Cartwright* v. *Cartwright*, 1 Phill. Eccl. Rep. 100; *White* v. *Driver*, ib. 88; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 434; *Waring* v. *Waring*, 6 Moo. P. C. 341; *Grimani* v. *Draper*, ib. 418; *Johnson* v. *Blane*, ib. 442; *Fowlis* v. *Davidson*, ib. 461, 474; and see *Kemble* v. *Church*, 3 Hagg. Eccl. Rep. 273; cf. also the remarks of Sir J. Nicholl, in *Brogden* v. *Brown*, 2 Add. 445; *Ayrey* v. *Hill*, 2 Add. 210; *Kinleside* v. *Harrison*, 2 Phill. Eccl. Rep. 459; *Evans* v. *Knight*, 1 Add. 239; *Wood* v. *Wood*, 1 Phill. Eccl. Rep. 363; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 605; and cf. further, *Hall* v. *Warren*, 9 Ves. 611; *Tatham* v. *Wright*, 2 Russ. & M. 21, 22; *Steed* v. *Calley*; 1 Keen, 620; *Ex parte Holyland*, 11 Ves. 11; *Faulder* v. *Silk*, 3 Camp. 126; *Dane* v. *Kirkwall*, 8 Car. & P. 683; *Creagh* v. *Blood*, 8 I. E. R. 434; 2 Greenleaf, Ev. 270; Taylor, Ev. i. 197; *Jenkins* v. *Morris*, 14 Ch. D. 674; *Smee* v. *Smee*, 5 P. D. 84.

(*g*) Ib.

furnished by the finding on an inquisition on the decision of another court or the direction of an issue (*h*).

Lucid interval or recovery.

The difficulty of rebutting the presumption of continued insanity varies, of course, with the character of the insanity and the remoteness of the period at which it has been observed to exist. It is greatest where the person can be shown to have been insane both before and after the critical periods. Hence it has been said that the evidence in support of a lucid interval should be as strong and as demonstrative of the fact as when the object of the proof is to establish derangement (*i*). It will be remarked that this rule does not require the state of mind during the lucid interval, or on recovery, to be as perfect as before the derangement; for example, a person might be held criminally responsible without having recovered sufficiently to acquire civil capacity. What it does require is, that the evidence to rebut the presumption of continued insanity in the interval between two established periods of insanity should be as strong as the evidence ordinarily required to rebut the first presumption in favour of sanity (*k*).

The kind of evidence required in particular cases to prove a lucid interval or recovery.

In the cases in which lucid intervals occur in *dementia* proper, and which are almost exclusively confined to senile patients, facts tending to show the recovery of memory, the recognition of friends, remembrance of their position and circumstances, and renewed appreciation of his own, are valuable evidence of the recovery of the alleged

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(*h*) See the cases cited in n. (*f*), but the presumption is again in part rebutted by leave having been granted to traverse, *Elliot* v. *Ince*, 3 Jur., N. S. 597.

(*i*) *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443.

(*k*) *Ex parte Holyland*, 11 Ves. 11; *Towart* v. *Sellars*, 5 Dow, P. C. 236; *Creagh* v. *Blood*, 2 J. & Lat. 510, 516; comp. the argument in *Lopdell* v. *Creagh*, 1 Bligh, N. S. 266; 2 Greenleaf, Ev. ss. 371, 372; and see generally, *Hall* v. *Warren*, 9 Ves. 611; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 575; *Wheeler* v. *Batsford*, ib. 599; *Brogden* v. *Brown*, 2 Add. 445; *Ayrey* v. *Hill*, ib. 209 *White* v. *Driver*, 1 Phill. Eccl. Rep. 88; *Cartwright* v. *Cartwright*, ib. 101; *Bannatyne* v. *Bannatyne*, 2 Rob. Eccl. Rep. 472.

Lucid interval or recovery.

lunatic (*l*). Where, on the other hand, the lunacy has mainly exhibited itself in delusions, the removal of those delusions must be proved in order to establish a perfect lucid interval or recovery (*m*). It is not enough that the alleged lunatic states that they are removed (*n*). A purely voluntary confession of delusion would be especially valuable (*o*).

The value of the character of the act itself in determining the question of sanity or insanity will be considered hereafter (pp. 412—414).

It will be remembered that it is not always necessary to establish a perfect lucid interval in order to maintain the act of a lunatic, as, *e.g.*, in the case of testamentary capacity where the will is not affected by the delusion (*p*).

Presumption that idiocy is incurable, lunacy curable.

3, 4. Idiocy is always incurable; lunacy is never incurable (*q*). These are presumptions more frequently referred to in the old books, where they are almost treated as *juris et de jure*, than in the modern reports; they are suggested in the Statute of Prerogatives, and lie at the root of many of the old legal distinctions between idiocy and lunacy. At the same time, the idiocy or lunacy must always have been found by the jury trying the principal question, the finding in another matter not being, as will be presently seen, conclusive (*r*).

(*l*) See, in particular, *Bannatyne* v. *Bannatyne*, 2 Rob. Eccl. Rep. 472.

(*m*) *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443; *Ex parte Holyland*, 11 Ves. 9.

(*n*) *Re Dyce Sombre*, 1 Mac. & G. 116; *East India Co.* v. *Dyce Sombre*, 4 W. R. 714; s. n. *Dyce Sombre* v. *Troup*, Deane, Eccl. Rep. 22.

(*o*) *Creagh* v. *Blood*, 2 J. & Lat. 518; cf. Casper, For. Med. pt. vi. 1, s. 78.

(*p*) *Greenwood* v. *Greenwood*, 3 Curt. App. 30; *Dew* v. *Clark*, 3 Add. 79; *Waring* v. *Waring*, 6 Moo. P. C. 341; *Smith* v. *Tebbitt*, L. R., 1 P. & D. 398; *Banks* v. *Goodfellow*, L. R., 5 Q. B. 570 *et seq.*; *Boughton* v. *Knight*, L. R., 3 P. & D. 64, 69; *Smee* v. *Smee*, 5 P. D. 84; *Jenkins* v. *Morris*, 14 Ch. D. 674; *Murfett* v. *Smith*, 12 P. D. 116; ante, pp. 355, 356.

(*q*) *Re Fitzgerald*, 2 Sch. & Lef. 438; *Ex parte Whitbread*, 2 Mer. 102; Co. Litt. 246 b, 247 a; 3 Mod. 44; 4 Rep. 126 a; 1 Bl. Com. 292; 17 Edw. 2, st. 2, c. 9.

(*r*) Post, p. 428.

Idiocy, as a distinct legal state, has of late disappeared; while the doctrine that lunacy is always curable has given way to experience; and evidence that the disease in a given case is beyond possibility of cure has been admitted to justify a more arbitrary dealing with the lunatic's property than would otherwise have been adopted (*s*).

Quasi-presumption from long acquiescence.

5. Although, perhaps, hardly a presumption, at least a strong suggestion of sanity arises where an attempt is made after a long period to impeach an act on the ground of insanity. Lord Eldon observed strongly on the danger of accepting evidence of insanity at a long distance of time (*t*); and in a modern case the Court of Chancery refused, chiefly on this ground, to set aside a conveyance by a lunatic made twenty-seven years before, though he had been found insane, not merely by the jury on an inquisition, but by the jury on an issue directed in the particular matter (*u*).

As to attestation.

6. Akin to this quasi-presumption is another to the effect that where the persons who have prepared deeds, or are the attesting witnesses to their execution, are dead, when process is commenced for setting such deeds aside, it will be assumed, in the absence of evidence to the contrary, that they would have sworn that the party was of sane mind when the deeds were executed, though it be attempted to disprove the fact of sanity by general parol testimony of incompetency at other times (*x*).

(*s*) *Ex parte Whitbread*, 2 Mer. 99; *Re Blair*, 1 M. & Cr. 300; *Re Clark*, 2 Phill. 282; *Re Croft*, 32 L. J., N. S., Ch. 481; *Re Frost*, 39 L. J., Ch. 808; *In re Evans*, 21 Ch. D. at p. 299, and vide ante, p. 154.

(*t*) *Towart* v. *Sellars*, 5 Dow, P. C. 236, 237. Of course, this is on the principle, "*Vigilantibus non dormientibus equitas subvenit*;" comp. the cases on laches, *cit. ap.* Story, Eq. Jur. s. 1520; cf. also *Browning* v. *Reane*, 2 Phill. Eccl. Rep. 69; *Winchcomb* v. *Hall*, 1 Ch. Rep. 41.

(*u*) *Price* v. *Berrington*, 3 Mac. & G. 486, 495; cf. *Ex parte Hall*, 7 Ves. 261, 264.

(*x*) *Towart* v. *Sellars*, 5 Dow, P. C. 245; and cf. *Harris* v. *Ingledew*, 3 P. Wms. 93; *Freshfield* v. *Reid*, 9 Mees. & W. 404, ante, p. 357.

CHAPTER II.

EVIDENCE OF INSANITY.

Conduct of alleged lunatic.

And first, herein of that most important kind which relates to the conduct of the alleged lunatic himself.

Conduct at, and conduct before and after, the critical time.

The primary value naturally attaches to conduct at the time when the state of mind is in dispute, but evidence of conduct before and after that time is admissible, as well that the jury may draw inferences as to the continuance of a given mental condition, as that they may determine the nature of the disease for other purposes, *e.g.*, whether it would be likely to betray itself to strangers (*a*). Only on inquisitions of lunacy is the period as to which evidence of conduct may go back limited by an express rule. In them it is usually confined to two years before the inquisition (*b*).

Relative value of these kinds of evidence.

The superior weight of evidence as to the state of mind at the critical time is illustrated by a modern case, where it was held by Erle, C.J., that fits of *mania* extending for twenty years anterior and down to the date when certain deeds were executed by a man found by inquisition some years afterwards to have been all the while insane, were no answer to a *primâ facie* case on an issue as to his sanity in executing the deed (*c*).

Value of the character of the act itself.

Amongst other conduct of the lunatic at the time his conduct in performing the act at all, or in other words, the rationality or irrationality of the act itself, is noteworthy, where the validity of an act or the alleged lunatic's responsibility for it is in question. This point has been raised more

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(*a*) *Beavan* v. *McDonnell*, 10 Exch. 184; cf. *Lovatt* v. *Tribe*, 3 F. & F. 9.

(*b*) 53 Vict. c. 5, s. 98, sub-s. (1).

(*c*) *Ferguson* v. *Barrett*, 1 F. & F. 613; cf. *East India Co.* v. *Dyce Sombre*, 4 W. R. 714, 718.

Value of the character of the act itself.

frequently, perhaps, in regard to wills than in regard to any other civil act, while writers on law and morality have from time to time endeavoured to derive from the principle involved an irresponsibility for crime, or, at least, for crime of a violent character.

Its rationality and irrationality.

In civil matters it may be taken that the rationality of the act itself and of the manner of doing it, though not conclusive as to the sanity of the doer, is very strong evidence of it, even where he has generally been regarded as insane, and may be under confinement on that account at the time (*d*).

On the other hand, where the doer is and has been generally regarded as sane, and the chief or only argument for insanity is to be derived from the character of the act, there must be strong internal marks of irrationality to produce any effect on the mind of the court (*e*).

Its spontaneity.

The spontaneity of the act is of weight in determining what importance should be attached to internal rationality. So, too, are its natural character, its accord with natural affection and moral duty, and its conformity to past and subsequent declarations of intention (*f*).

(*d*) Swinb. pt. ii. s. 3, pl. 14; *Snook* v. *Watts*, 11 Beav. 108; *Banks* v. *Goodfellow*, L. R., 5 Q. B. 558, 559; *Cartwright* v. *Cartwright*, 1 Phill. Eccl. Rep. 90; *Scruby* v. *Fordham*, 1 Add. 90; *In the goods of Watts*, 1 Curt. 594; *Montefiore* v. *Montefiore*, 2 Add. 361, 362; *Chambers* v. *Queen's Proctor*, 2 Curt. 415, 451; *Nicholls* v. *Binns*, 1 Sw. & Tr. 239; *McAdam* v. *Walker*, 1 Dow. 178; but see *Clarke* v. *Lear*, *cit. ap.* 1 Phill. Eccl. Rep. 119; *Evans* v. *Knight*, 1 Add. 237, 238; *Bannatyne* v. *Bannatyne*, 2 Roberts, 472, 501; *Creagh* v. *Blood*, 2 J. & Lat. 520; *Att.-Gen.* v. *Parnther*, 3 B. C. C. 443; *Waring* v. *Waring*, 6 Moo. P. C. 341; *Jenkins* v. *Morris*, 14 Ch. D. 674; *Smee* v. *Smee*, 5 P. D. 84; *Murfett* v. *Smith*, 12 P. D. 116.

(*e*) 2 Bl. Comm. 503; *Wrench* v. *Murray*, 3 Curt. 623; *Boughton* v. *Knight*, L. R., 3 P. & D. 64; *Arbery* v. *Ashe*, 1 Hagg. Eccl. Rep. 214; and see *Burr* v. *Davall*, 8 Mod. 59; *Jenkins* v. *Morris*, 14 Ch. D. 674.

(*f*) *White* v. *Driver*, 1 Phill. Eccl. Rep. 84, 88; *Cartwright* v. *Cartwright*, 1 Phill. Eccl. Rep. 90; *Evans* v. *Knight*, 1 Add. Eccl. Rep. 237, 238; *Anon.*, *cit. ap.* *McAdam* v. *Walker*, 1 Dow, 178; *Coghlan* v. *Coghlan*, *cit. ap.* 1 Phill. Eccl. Rep. 120; *Clarke* v. *Lear*, *cit. ib.* p. 119; *Bannatyne* v. *Bannatyne*, 2 Roberts, 472, 501.

In regard to criminal acts.

In a criminal act, some at least of these constituents are wanting; and hence the difficulty, already referred to, of establishing a lucid interval to create responsibility for a criminal act committed by a lunatic (*g*). But it must be remembered, that the test of sanity for criminal responsibility is lower than for other purposes (*h*).

Value of the character of the act itself.

To the doctrine that the irrationality of crime proves the insanity of the criminal, it is enough to reply that, at any rate, the disposition to crime is a madness which can commonly be acted upon by motives; and, if this is so, then it is not unreasonable to punish crime (*i*).

A diagnosis of criminal responsibility, chiefly relating to the act itself, has been already given (*k*).

Conduct before and after the actual time, its value in different cases.

The value of the alleged lunatic's conduct before and after the critical period, to determine his sanity or insanity, varies materially with the kind of mental disease with which the person is or is alleged to be affected. Thus congenital *dementia* being chronic, and, if admitting of any change, only improving by slow degrees (*l*), it is more justifiable to argue from one period to another where the case is of this kind, than where it is one of adventitious *dementia* (*m*); unless, indeed, that *dementia* has been the result of a sudden shock or of an illness, which has left the patient in a state resembling idiocy proper (*n*). *Mania*, although usually intermittent in manifestation, is also usually continuous in duration (*o*); but the signs of *mania*, after the act in question, especially when it has been of a criminal or violent character, must be received with caution. They may be feigned, or the *mania* may be the consequence rather than the cause of the act.

General habits more important than particular acts.

In considering the conduct of a person with a view to learning his state of mind, general habits are more im-

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(*g*) *Hadfield's case*, 27 St. Tr. 1281; Steph. Hist. of Criminal Law of England, vol. ii. c. xix.
(*h*) Ante, pp. 385 *et seq.*
(*i*) Arist. Nic. Eth. iii. 4.
(*k*) Ante, pp. 392, 393.
(*l*) 2 Tayl. Med. Jur. 488 *et seq.*
(*m*) Ib.
(*n*) Ib. 489.
(*o*) Ib. 471 *et seq.*

portant determinants than particular acts. "Where," said Lord Langdale, "a man's ways and general course of life are such as to indicate sanity, and a knowledge of his affairs, proof of one or more particular acts, though very strange in themselves, and though affording some ground for imputing insanity, would not be a sufficient proof to show that all his acts were done under the delusion of insanity. On the other hand, where a man is thought by various persons to have been insane at a particular period, and to have continued so ever since, proof of one or more acts done afterwards, apparently in the manner of a man of sound mind, would not, if unaccompanied by other proof and the application of some test or inquiry, prove that the acts done were done under circumstances free from delusion, or, what is quite as much of importance, free from that influence to which persons acting under insane delusions are confessedly liable" (*p*).

Habits of the alleged lunatic more important than particular acts.

Accordingly, it has always been held that a good deal more must be taken into consideration than particular acts of apparent insanity. Such acts may proceed from eccentricity, which is nevertheless sane; they may be the result of *delirium*, which is consistent with general sanity; they may, in fine, arise from perfectly justifiable though unexplained motives. Such acts must therefore be observed in the light of the general conduct, or, in other words, the alleged lunatic must be compared, not only with others, but with himself (*q*).

Again, as conduct is a better determinant than particular acts, so acts are better determinants than words. Exclamations suggestive of the existence of delusion may be wrung from the victim of hallucination or illusion, who may, the instant after, be conscious that his senses are deceiving him. A man from affectation, desire of notoriety,

Acts of the alleged lunatic more important than his words.

(*p*) *Snook* v. *Watts*, 11 Beav. 108.

(*q*) Cf. p. 9, ante, for the distinction between eccentricity or *delirium* and insanity; and Sir. J. Hannen, in *Boughton* v. *Knight*, L. R., 3 P. & D. 75, *et ubi sup.*, p. 410, n. (*p*).

hope of acquittal, or other similar motive, may habitually employ language characteristic of delusion, and yet never cross the Rubicon dividing sanity from insanity. These are cases in which words would lead to a false judgment of insanity. On the other hand, a man may be really subject to delusions on particular points, while his general sanity will make him perfectly aware of the probable consequences of revealing them. Here the absence of insane words would not lead to a safe conclusion of sanity. Action neither lends itself so readily to affectation nor is so obedient to the promptings of expediency. A man will not act what he does not believe when he sees that action will lead him into danger; he will act what he does believe when he is convinced that action is the only means of security; and in this latter case the fear of counter-opinion, which silences speech, is not powerful enough to control action.

Suicide, how far indicative of insanity.

Among the particular acts which have seemed to countenance the conviction of a person's insanity, that of his suicide stands pre-eminent. It is true, perhaps, that the frequency with which coroners' juries return an unsound state of mind in these cases is a better test of the inexpediency of the existing law in relation to *felo de se* (*r*) than of the real connection between suicide and insanity (*s*). At the same time the fact of suicide is so directly opposed to the strongest of the natural instincts of human nature as to argue some considerable perturbation of the mental faculties of those who commit it (*t*).

(*r*) "Whenever the offence inspires less horror than the punishment, the rigour of the penal law is obliged to give way to the common feelings of mankind." Gibbon, Decl. & Fall, c. 14. The point is further illustrated by the less disinclination of juries to convict where an attempted suicide is connected with some other crime, and is unsuccessful. See *Reg.* v. *Rumball*, Cent. Cr. Ct., May, 1843; *Reg.* v. *Furley*, Cent. Cr. Ct., Apr. 1844; *Reg.* v. *Gathercole*, 1839; *Reg.* v. *Fisher*, Taunton, Spr. Ass. 1865; *Reg.* v. *May*, Cent. Cr. Ct., Nov. 1872.

(*s*) 1 East, P. C. 389, 390; 1 Hawk. P. C. c. 27, s. 3; Comb. 2, 3.

(*t*) *Rex* v. *Saloway*, 3 Mod. 100. Some medical authorities go so far as to assert that the suicidal propensity is in all cases and under

The true legal doctrine would seem to be, that if suicide affords any presumption of insanity, it is only of insanity at the moment of the act; and even then, if unsupported by other evidence of insanity, it is not enough to deprive the person of imputability (*u*).

Stronger evidence of the act itself being insane than of previous acts being so.

It is plain why the additional evidence required to prove the insanity of a suicide is much stronger when it is required to prove it prior to, than when it is required to prove it at the moment of, the act. First, there is the *primâ facie* difference that in the one case there is an interval of time between the act adduced in evidence and the act, the character of which is in question, while in the other they are identical; secondly, *felo de se* is a crime, and the presumption of the law is in favour of innocence; thirdly, there is the fact that forfeiture used to follow on *felo de se*, and the law construes against forfeiture. All these considerations, if not affording a presumption of the insanity of suicide, do, at any rate, warrant the jury in finding insanity on very slight independent evidence of the fact (*v*).

Cases in which subsequent suicide has not concluded insanity.

On the other hand, there is repeated authority for the proposition that insanity cannot be inferred from the mere fact of subsequent suicide (*w*).

In one case a marriage was upheld where the husband committed suicide the same day (*x*).

In another, where there was no evidence of insanity at the time of giving instructions for a will, the commission of suicide three days after did not invalidate it (*y*).

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all circumstances a positive sign or symptom of a disordered mind. See Journ. of Med. Science, April, 1861, p. 110.

(*u*) *M'Adam* v. *Walker*, 1 Dow, Parl. Cas. 187, per Lord Redesdale; 4 Bl. Comm. 189; and cf. the cases on suicide as affecting policies of insurance, *e.g.* *Borrodaile* v. *Hunter*, 5 M. & G. 639; *Schwabe* v. *Clift*, 3 C. B. 481; *Dufaur* v. *The Professional Life Ins. Co.*, 25 Beav. 599; *Jones* v. *The Consolidated Ass. Co.*, 26 Beav. 256; ante, pp. 378—380.

(*v*) 1 East, P. C. 389, 390.

(*w*) See the cases cited below, as well as *Steed* v. *Calley*, 1 Keen, 620.

(*x*) *M'Adam* v. *Walker*, 1 Dow, P. C. 148.

(*y*) *Burrows* v. *Burrows*, 1 Hagg. Eccl. Rep. 109.

In a third, even where there was evidence that the testator had been labouring under delusions for three days previous to the execution of the will, and he committed suicide on the day following, the will was pronounced for, and the costs of the Queen's proctor, who opposed the will on behalf of the crown, were refused (*z*).

Right influence of suicide.

On the other hand, subsequent suicide does suggest the idea of insanity; it makes it proper to consider whether, at the time of the act, the validity or criminality of which is in question, the person did intend to commit suicide; and if it were proved that he was at the moment under the influence of the morbid feeling, it might be a circumstance of considerable weight in leading to the inference of insanity (*a*).

The inspection of the alleged lunatic.

In cases in which the actual condition of the alleged lunatic at the moment is required to be determined, as, for example, where he is the subject of an inquisition of lunacy, or is alleged to be incompetent to plead at bar on a criminal charge, the actual inspection of the person is of great importance. Idiocy, we have seen, may, according to the authorities, be discerned (*b*). An old method of traversing was for the lunatic to appear before the king in his court to be inspected; and the lunatic is still inspected by the judge in lunacy before leave to traverse is given. The value of personal inspection is indeed repeatedly recognized by the legislature and by the practice of the

Ante, p. 399.

Ante, p. 77.

(*z*) *Chambers* v. *Queen's Proctor*, 2 Curt. 415.

(*a*) *M'Adam* v. *Walker*, 1 Dow, P. C. 179, per Eldon, C.; Shelford on Lunacy, p. 66.

(*b*) Skinner, 5; but this, it would seem, is confined to congenital *dementia*. Casper says, "Though the physical condition of a person is undoubtedly a fact to be taken into account in ascertaining his mental condition, it is not by any means conclusive in ordinary cases." . . . "There is not one single somatic cause (other than congenital) the discovery of which in itself permits any certain inference as to the existence of psychical disturbance. On the other hand, there are hundreds of cases of unquestionable mental alienation, the existence of which is not in the very slightest betrayed by any perceptible bodily alteration." Casper, For. Med. pt. vi. c. 1, s. 61.

courts (*c*). In addition to the case of traverse, the judge in lunacy must inspect the lunatic before permitting him to have the inquisition tried by a jury, and before granting a *supersedeas*. The alleged lunatic, when within the jurisdiction, must be inspected by the jury or master trying the inquisition; and if the trial is in one of the divisions of the High Court, that inspection must be had both before and after the other evidence. The examination of the alleged lunatic on this inspection is as legitimate a ground for the verdict as any other part of the evidence. Again, the alleged lunatic must be personally examined, if a pauper by one, if a non-pauper by two, medical practitioners, before he is admitted into an asylum, hospital or house; and each medical practitioner is required expressly to distinguish on his certificate facts observed by himself and leading to the inference of insanity from facts observed by other persons. Such are some of the prominent examples of the importance attached to personal inspection. The points to which the authority whose decision is required should properly direct his attention, will be readily gathered from the remarks already made as to the characteristics of the several kinds of insanity.

Ante, p. 49.
Ante, p. 204.
Ante, p. 70.
Ibid.
53 Vict. c. 5, ss. 4 16, 28.

Post-mortem examination.

In some cases, medical evidence as to the appearance of the brain of a deceased person has been admitted (*d*). Many authorities on the phenomena of this class characteristic of insanity are cited in Taylor. The increase in the number of *post-mortem* examinations in the case of deaths in asylums will no doubt assist in the establishment of some general principles. At the same time, the comparatively small number of *post-mortem* examinations of persons indisputably sane prevents the application of the method of difference required to give these principles the authority of legitimate inductions. It is submitted, there-

(*c*) Cf. in the old books, *Elliot's case*, Carter, 53; *Ex parte Wright*, 1 Vern. 155.

(*d*) *Roberts* v. *Kerslake*, Warwick Aut. Ass. 1854.

fore, that evidence of this kind must be accepted with extreme caution.

Writings of the alleged lunatic.

Among the acts of an alleged lunatic which deserve special mention are papers and documents written or drawn up by him. In many cases the insanity, which may be concealed in an interview, will betray itself in writing; just as on the other hand some show their insanity less in writing than when subjected to oral examination. M. Moreau gives as the result of his experience, that among those who are affected with *dementia* the mental disorder shows itself in a stronger form when they write than when they speak, while the converse condition is observed in *mania* (*e*).

The matter.

The matter of the papers is naturally the most important element in the evidence. Reference has frequently been made to the effect, in the case of disputed wills, of the document itself being rational or sounding to folly (*f*). Papers written subsequently to the execution of a will may also be admitted in evidence (*g*), though regarded with some jealousy (*h*). There is no reason why the same admissibility should not extend to papers written shortly before the critical period. In one case the lords justices directed an inquiry in lunacy mainly on the evidence of some letters of the alleged lunatic. The proper course in such a case is to make the letters exhibits to an affidavit or affidavits verifying the handwriting (*i*).

The handwriting.

But the handwriting may itself be to some extent evidence for or against insanity. In *Cartwright* v. *Cartwright* (*k*), stress was laid on the fact of the will being written by the testatrix without fault or flaw from beginning to end, and in a clear and legible text. Dr. Taylor

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(*e*) Pagan, Med. Jur. of Ins. p. 19; Ann. d'Hyg. 1864, i. 384; Taylor, Med. Jur. ii. 527 *et seq.*

(*f*) See the cases cited at p. 413, vide also the practical suggestion, ante, p. 357.

(*g*) *Bootle* v. *Blundell*, 19 Ves. 506; *Sharpe* v. *Macaulay*, Winchester, Aut. Ass. 1856, per Martin, B.

(*h*) *Bootle* v. *Blundell*, 19 Ves. 506.

(*i*) *Re Scott*, 22 W. R. 748.

(*k*) 1 Phill. Eccl. Rep. 100 *et seq.*

refers to the Ann. d'Hyg. 1864, i. 379, for a complete essay by Dr. Marcé on the writings of the insane, with fac-similes of the handwriting of persons labouring under *dementia*, *mania* and other forms of insanity, as well as the medico-legal conclusions to which they lead (*l*).

Hereditary insanity.

That insanity is frequently hereditary may be taken as proved by the concurrent testimony of all writers on the subject (*m*). Practically, therefore, the existence of insanity in the family of the person whose sanity is in question is an important fact for the decision of the point. Nevertheless, at one time it seems to have been denied that this fact was admissible in evidence at all; and even now it is hardly established by authority that it can be adduced in civil cases. In *M'Adam* v. *Walker* (*n*), it was said by Sir S. Romilly, *arguendo*, that in a late case at the Common Pleas, the heir-at-law offered to prove hereditary insanity against a testator, but this proof was rejected (*o*). In the same case Lord Eldon spoke of the question as a very delicate point, and escaped deciding it (*p*). And in a case in 1838, to try the validity of a deed, Gurney, B., refused to allow a witness to be asked whether a sister of the executing party had not been insane (*q*).

How far admissible in evidence.

On the other hand, the evidence of lunacy in civil cases is not in other respects different from that in criminal, nor does there seem adequate reason why any distinction should exist. In criminal cases the existence of insanity, not merely in ancestors but in collaterals, has been admitted in evidence (*r*), though it has been required, at least on

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(*l*) Taylor, Med. Jur. ii. 528.

(*m*) Casper, For. Med. pt. vi. c. 2, s. 71; Taylor, Med. Jur. ii. 493; but of course the time at which the disease has appeared in the ancestor and any special cause for it, must be taken into consideration. Casper, *ubi sup.*

(*n*) 1 Dow, 148.

(*o*) Ib. pp. 173, 174.

(*p*) Ib. p. 177. The commissioners and court of session had rejected the evidence. Ib. p. 161.

(*q*) *Doe* v. *Whitefoot*, 8 C. & P. 272.

(*r*) *Reg.* v. *Ross Touchet*, 1844; *Oxford's case*, 9 C. & P. 547; *Reg.* v. *Westron*, C. C. C. Feb. 1858; *Reg.* v. *Townley*, Derby Wint. Ass. 1863; *Reg.* v. *Edmunds*, C. C. C.

Hereditary insanity.

one occasion, that the party asking the question should in the first instance prove by the testimony of medical men that insanity is often hereditary in a family—this being a matter of fact and not a matter of law.

In America, evidence of this kind is admissible in all cases alike. In the ecclesiastical courts it was admitted in a limited degree, that is to say, in reference to persons nearly related to the person whose sanity was in question (*s*), but in respect of more remote connections refused (*t*).

Why evidence of hereditary insanity more admissible in criminal than in civil cases.

That greater importance should be attached to the fact of hereditary insanity in criminal than in civil cases may indeed be true, not merely *in favorem vitæ*, but because insanity, though existent in a family, will very frequently not exhibit itself except under the influence of some excitement, and this a criminal act is more likely than a civil to produce. Still it would be competent for the party opposing the contention of insanity to call medical evidence to inform the jury that generally some specially moving cause or excitement is required to awake constitutional insanity, that it is frequently atavistic, or, in other words, passes over one or more generations in a family (*u*), and finally that insanity is not invariably hereditary even in the direct line. Thus forewarned it would seem that the jury might be trusted to form a proper estimate of this kind of evidence.

Treatment of the alleged lunatic by others.

The treatment of the alleged lunatic by his family and those intimately connected with him is another of the facts relevant to the determination of his mental condition; though, taken by itself, only as against the parties themselves whose mode of treatment is adduced.

Jan. 1872; *O'Connor's case*, 1872. In *Reg.* v. *Greensmith*, Midl. Circ. July, 1837, this kind of evidence was rejected.

(*s*) *Tyrell* v. *Jenner*, 8 App. Cas. 42.

(*t*) *Turner* v. *Penny*, 1843, Apr. 21; *Frere* v. *Peacocke*, 3 Curt. 664.

(*u*) It is said that, when insanity is transmitted by hereditary descent, it appears often about the same age, and under the same form, and is induced by the same exciting cause in the offspring as in the parent. Taylor, Med. Jur. ii. 493.

As against them.

Where a man's friend and relations have acted towards him and permitted him to act as if he were sane, this fact is an important commentary upon a subsequent contention that he was insane all the while. On the other hand, where a man has been dealt with as insane, those who so dealt with him are bound to explain their action before they can establish sanity or a lucid interval where it is to their interest to do so (*x*).

As against third parties.

As against third persons the treatment of the lunatic, *per se*, is inadmissible in evidence; it indicates no more than a mere opinion upon the state of mind of the alleged lunatic, which is neither upon oath nor subject to the test of cross-examination (*y*).

As introducing evidence of lunatic's acts, &c.

But such treatment is admissible to introduce evidence of what the alleged lunatic himself did in respect of it, of the extent to which he was conscious of or affected by it, and of his acts and words in reply.

Letters written to alleged lunatic.

The same is law of letters written to the alleged lunatic; by themselves they are inadmissible in evidence, but if it is once shown that the letters were read by him so that he could exercise any act of judgment upon their contents, or if it is shown that he did exercise any act of judgment and reason, as by answering them or by acting upon them, in each and every of these cases the letters are admissible in

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(*x*) In *Windham's case* (31 L. J., N. S., Ch. 721), one of the petitioners had shortly before the petition negotiated with him for the sale of a piece of land of the value of 1,000*l.*, thereby admitting his capacity to transact business. See also the judge's observations on this point in *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433.

(*y*) Mr. Taylor (on Evidence, i. 509, ed. 8) states the inadmissibility of this evidence more generally, and without referring to the exception which arises when the previous conduct in question is that of the persons themselves who are interested in contending for a conclusion inconsistent with it. It is submitted, however, that questions as to such previous conduct would, as against those parties, be admissible, at any rate in cross-examination. And some judges have gone even further; *e.g.* Sir H. Jenner, in *Morgan* v. *Boys* (1838), said, "The best rule to guide the court is the conduct of persons towards the deceased."

Letters.

evidence, such evidence varying in its weight upon the subject of inquiry according to the degree of judgment and capacity which is imported by such acts done and that weight being a question for the jury (*z*).

Evidence of the lunatic himself.

The evidence of the lunatic himself, after his recovery, is insufficient evidence of disability on which to obtain any indulgence from the court, even in matter of procedure (*a*). So, the evidence of the lunatic as to his own sanity is inadmissible (*b*).

General reputation.

General reputation is inadmissible in evidence, either to prove the fact of insanity or to fix another with notice of it (*c*).

Opinions of witnesses;

The opinions expressed by witnesses as to the sanity or insanity of a person, though admitted in the old ecclesiastical courts, and now in America generally, are not received in evidence in our courts. Even where admitted, they have been received with caution; first, because, in offering them, the witnesses more or less usurp the functions of judge or jury, and affect to decide the very point at issue; and secondly, because these opinions are so constantly contradictory in character. It is more easy to account than to propose a remedy for this. The different estimates that are formed of the nature of insanity,—the variations in its moods and phases, the changes frequently exhibited by the same patient from day to day, and even from hour to hour, and which may prevent any two witnesses seeing him in precisely the same condition,—these, added to the involuntary tendency of witnesses, however impartial, to become partisans, are among the most important causes of the divergencies of expressed opinions (*d*). Nor are medical men,—from

most divergent;

(*z*) *Wright* v. *Doe* d. *Tatham*, 1 Ad. & Ell. 8; cf. *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 609.

(*a*) *Knight* v. *Young*, 2 V. & B. 184.

(*b*) *Bootle* v. *Blundell*, 19 Ves. 506.

(*c*) *Greenslade* v. *Dare*, 20 Beav. 284.

(*d*) *Kinleside* v. *Harrison*, 2 Ph. Eccl. Rep. 456; *Evans* v. *Knight*, 1 Add. 239, 240; *Williams* v. *Goude*, 1 Hagg. Eccl. Rep. 589 *et seq.*

whose scientific training more hesitation in forming, as well as more reserve in expressing, their opinion on so doubtful a subject might have been expected,—any exception to this general rule. There has been scarcely an important trial on the question of lunacy in which there have not been files of medical witnesses, often including some of the most celebrated names in the profession, arrayed in opposition to each other (*e*). even where those of experts.

Spectacles such as this have indeed produced so deep an impression on the minds as well of laymen acquainted with the subject as of lawyers, that some have not failed to express their doubt as to the value of medical evidence at all.

Thus Lord Shaftesbury, in his evidence before the Royal Commission in 1859, stated as follows:— Lord Shaftesbury's view in 1859.

"For my own part I do not hesitate to say, from very long experience, that, putting aside all its complication with bodily disorder, the mere judgment of the fact whether a man is in a state of unsound mind and incapable of managing his own affairs and going about the world requires no medical knowledge. My firm belief is that a layman, acquainted with the world and with mankind, can give not only as good an opinion but a better opinion than all the medical men put together" (*f*).

This, of course, is rather a rhetorical exaggeration; but the judges have shown themselves scarcely less severe. "I have seen enough," said Lord Cottenham, of professional opinions to know that in matters of doubt, upon which the best constructed minds may differ, there is no difficulty in procuring professional opinions upon either side" (*g*). Lord Cottenham.

(*e*) Conf. *Carpenter's case*, Dublin Med. Press, July 16, 1845, p. 46; *Cumming's case*; *Windham's case*; *Mordaunt's case*; *Re Taylor*; *Dyce Sombre's case*; Pagan, Med. Jour. of Ins. p. 301; Journ. of Psych. Med. Apr. 1852; Med. Apr. 1852; Med. Gaz. vol. v. p. 719; vol. xi. p. 740; vol. xvii. p. 816; Taylor, Med. Jur. ii. 522.

(*f*) Sess. Pap. 1859, p. 23.

(*g*) *In re Dyce Sombre*, 1 Mac. & G. 128; so per Bramwell, B., in *Reg.* v. *Leander*, Cent. Cr. Ct June, 1864.

Distinction between opinions formed *ante litem motam* and those formed *post litem motam.*

It will be observed, however, that these last remarks apply particularly to opinions obtained *post litem motam.* To scientific opinions formed *ante litem motam*, somewhat different considerations may be thought to apply. It is well known that with practice the process of drawing inferences from particular classes of phenomena becomes almost unconscious, and the judgments formed thereupon acquire the likeness of intuitions. In these cases, from the rapidity of the mental action, the individual facts on which the opinion is based are retained less vividly in the memory than the opinion itself. Now a medical man has an unequalled experience in this process of drawing inferences in the special sphere relating to health and disease, and it might well be that the facts have escaped his mind, though he is able to depose upon oath to the opinion. Nevertheless it may be taken that a question as to an opinion formed upon facts which have been forgotten would not be permissible. Indeed, it does not seem that even where the witness is ready to go into the particular facts, a direct question as to his opinion, although by no means uncommon, has ever upon argument been decided to be correct in form (*h*).

(*h*) The admission of medical opinion in evidence has seldom been carried further than it was in *Martin* v. *Johnston* (1 F. & F. 122), where general evidence of the opinion of the medical attendant as to the sanity of a testatrix, who had resided in an asylum thirty years before, was admitted, the opinion having been formed from official visits. A written declaration as to her sanity by this and the deceased medical attendants, made on a non-official visit at the time the will was executed, was not admitted (Ibid.). In *Lovatt* v. *Trile*, 3 F. & F. 9, Erle, C. J., laid it down that, on a plea of insanity at the time of making a contract, the opinion of medical men who give the certificates for the party's confinement at or about the time is only evidence for the jury, who must judge of the grounds on which it was formed. In a Scotch case it was yet more broadly held, that in questions of insanity the inference to be derived from general peculiarities in the manner, speech, behaviour and letters of an alleged lunatic, should be drawn by the jury for themselves, and that they should not be guided by the opinions formed by the medical witnesses. *Morrison* v. *Maclean*, 24 Sc. Sess. Cas., 3rd Ser. 625.

Medical assessors.

Another aspect of the problem of medical evidence presents itself in reference to the introduction of the medical man as practically an assessor to the jury. One of the questions proposed to the judges by the House of Lords, in relation to the law respecting acts of a criminal nature committed by persons alleged to be insane, was,—Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole of the trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time? The judges replied as follows: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions of a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question substantially one of science only, it may be convenient to allow the question to be put in the general form, though the same cannot be insisted on as a matter of right" (*i*). Whatever

(*i*) 8 Scott, N. R. 603. German law attributes a definite part to the medical expert in the determination of insanity. "The judge must examine and determine, with the aid of medical experts, whether any one is to be considered lunatic or imbecile." Gen. Com. pt. ii. tit. 18, f. 13. But, at the same time, "The responsibility of the culprit is one of the facts to be determined by the jury." St. 1852, May 3, Art. 81; see also Crim. Reg. f. 280; Gen. Jud. Reg. tit. 18, ff. 6, 7; cf. also Casp. For. Med. pt. vi. c. 1, f. 65. On this point Casper remarks: "Considering that it is always and everywhere a maxim that the physician is exclusively employed with the natural object (for judicial ends), considering further that the subject of criminal responsibility deals with the applicability of the penal statutes, with something very different therefore from the natural

may be the meaning of this last qualification, a question put in the above stated, or some similar form, has been allowed in more than one case (*k*).

Effect of finding of lunacy by another jurisdiction.

Generally speaking, it may be said that the question of sanity or insanity must be tried by the court, jury or other authority before whom the principal question affected by the condition of the alleged lunatic's mind is tried. In one or two cases, notably that of marriage, the legislature formerly raised the effect of a previous determination of insanity into a presumption *juris et de jure*, but it exists as such no longer (*l*). In some other cases a simple presumption arises from the fact of such previous determination; these have already received some consideration, but it will be convenient to mention them again. It need only be remembered that the criterion of lunacy varies for different purposes, to show that the establishment of lunacy in one case, and for one purpose, need not necessarily conclude the fact in other cases, and for other purposes.

Inquisitions of lunacy.

1. How far are inquisitions of lunacy evidence against third persons, or against the crown? The reply may be stated thus:—

(a.) Inquisitions of lunacy may be given in evidence of insanity, both in criminal (*m*) and in civil proceedings (*n*).

(b.) The finding of insanity on an inquisition creates a presumption in favour of insanity, and throws the

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object, it cannot be doubted but that the physician has only in the respective cases to lay before the judge the scientific material, and to leave it to him alone to decide as to the question of responsibility." Casp. For. Med. pt. vi. c. 1, f. 59.

(*k*) *E.g.*, *Manchester* v. *Bennett*, Kingston Lent. Ass. 1854. But see *Bainbrigge* v. *Bainbrigge*, 4 Cox, C. C. 454.

(*l*) Ante, p. 265; and conf. *Leonard* v. *Leonard*, 14 Pick. 280; Greenleaf on Evidence, vol. i., pp. 725, 731.

(*m*) *R.* v. *Bowler*, Shelford on Lunacy, p. 590.

(*n*) *Sergeson* v. *Sealey*, 2 Atk. 412; *Faulder* v. *Silk*, 3 Campb. 126; *Dane* v. *Kirkwall*, 8 Car. & P. 679; *Hall* v. *Warren*, 9 Ves. 609; *Browning* v. *Reane*, 2 Phill. Eccl. Rep. 69; *Hume* v. *Burton*, 1 Ridg. P. C. 204; *Re Nesbitt*, 2 Ph. 245.

onus of proof on those who contend the contrary (*o*).

Effect of part finding of lunacy by inquisition.

(c.) But neither is a finding of insanity conclusive of insanity (*p*), nor a finding of the absence of insanity conclusive of sanity (*q*).

(d.) *A fortiori*, the finding on an inquisition of lunacy is not conclusive evidence of the period at which the lunacy commenced (*r*).

(e.) Nor, finally, is an inquisition conclusive evidence of the time of taking the inquisition (*s*).

Thus it appears that, although inquisitions stand upon a somewhat better footing than other *res inter alios actæ*, yet, being in their nature *ex parte* proceedings, they are not absolutely conclusive on other parties. It is competent for such parties to dispute the fact, and to maintain that, notwithstanding the inquisition, the subject of it was of sound mind at any period of time over which the inquisition extended (*t*). Nor, it seems, is a party the more concluded because he attended the execution of the commission, and an applicant for leave to do so cannot be required beforehand to consent to be bound by the decision of the master or jury (*u*).

Coroner's inquest.

2. Whether the verdict of a jury in a coroner's inquest, finding a person insane or *felo de se*, can be admitted in evidence in a civil proceeding is doubtful, the judges, in the only case of the kind which has come before the court, being divided in opinion (*x*). From analogy it would certainly

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(*o*) *Hall* v. *Warren*, 9 Ves. 609; *Snook* v. *Watts*, 11 Beav. 105, 107.

(*p*) *Sergeson* v. *Sealey*, 2 Atk. 412; *Clements* v. *Rhodes*, 3 Add. 37; *Hall* v. *Warren*, 9 Ves. 609; *Rodd* v. *Lewis*, 2 Lee, Eccl. Cas. 176; *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 356; *In bonis Watts*, 1 Curt. 594; *Bannatyne* v. *Bannatyne* 2 Roberts, E. C. 472; *Elliott* v. *Tuer*, 5 W. R. 482.

(*q*) *Hume* v. *Burton*, 1 Ridg. P. C. 204.

(*r*) *Ex parte Bradbury*, 3 Jur. 1108.

(*s*) *Sergeson* v. *Sealey*, 2 Atk. 412.

(*t*) Taylor on Evidence, ii. 1429, ed. 8; Greenleaf on Evidence, vol. i. pp. 730, 731.

(*u*) *Re Nesbitt*, 2 Ph. 245.

(*x*) *Jones* v. *White*, 1 Str. 68.

seem that, like so many similar judgments *in rem* an *inquisitio post mortem* might be read as evidence of the fact of sanity or insanity, though wanting in the characteristic quality of a judgment *in rem* of being evidence of the fact determined against all mankind.

The effect of a coroner's inquest in itself in relation to cases of suicide varies according as the finding is insanity or *felo de se*. In the latter case, after some dispute, it has been established that the finding may be traversed (*y*); in the former, no traverse can be allowed to make a man *felo de se* (*z*), and the utmost permissible is a writ of *melius inquirendum*, which can only be on the misconduct of the coroner or jury (*a*).

Concluding observations on evidence.

In conclusion it may be observed that there is, perhaps, no question brought before any court in which more contradiction appears on the face of the evidence than that of insanity. Except in its extreme forms, which seldom require the intervention of the ordinary courts, insanity is a state so uncertain in its manifestations, so changeable in its moods, so variable in its degrees, so full of method in its wildest eccentricities, and of eccentricity in its most rational acts, that facts indicative of soundness and unsoundness respectively almost always admit of being marshalled in formidable numbers to rebut each other. If to this be added the various estimate that different people take of the actions of their fellow-men, the influence that familiarity possesses to weaken the impression on the mind of a particular kind of conduct in those with whom one constantly associates, the consciousness of the changes that the vicissitudes of life occasion in the disposition and demeanour even of the most sane, and the horror with which the presence of a disease, terrible alike for itself and for the

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(*y*) 3 Inst. 55; 1 Hale, P. C. 416, 417; *Rex.* v. *Ripley*, Skin. 45; *R.* v. *Alderman*, 3 Keb. 564, 604; *Ripley's case*, Sir T. Jones, 198; *R.* v. *Parker*, 3 Keb. 489; Br. Trav. 229; 1 East, P. C. 389; 1 Wms. Saund. 363.

(*z*) *Anon.*, 1 Vent. 239, 278.

(*a*) *R.* v. *Hethersal*, 3 Mod. 80; 2 Hawk. P. C 54; *R.* v. *Bunney*, 1 Salk. 190; 1 Wms. Saund. 363, n. (1).

well-founded belief in its frequently constitutional character, is admitted,—if, finally, account be taken of the bias of interest and partisanship to which minds the most scientific and impartial are nevertheless exposed,—it will be felt that the utmost intention of honesty and uprightness, and a very high degree of accuracy in the statement of observed facts, may yet be consistent with absolutely contradictory tendencies in the evidence adduced.

Method of estimating contradictory evidence as to insanity.

In such cases the authority which has to decide the question of sanity or insanity is unable to determine the fact on the evidence which goes directly to it, and avails itself of an indirect method of ascertaining the truth; what that method is may be gathered from the following remarks of Tindal, C. J., in a case in which an issue had been directed to determine the state of mind of a testator at the time of the execution of a disputed will (*b*).

Tindal, C. J., in *Tatham* v. *Wright.*

"Where," said his lordship, "the question of competency is to be resolved on testimony so adverse and repugnant as the present (and such repugnance does not consist so much in a contradictory account of single facts as in the general narrative of transactions extending through the space of a long life), it is useless to argue on each particular fact brought forward on either side, or on the testimony given by each particular witness. The only inference that can be safely drawn is that which arises from the general effect and tendency of the whole body of proof on each side of the question. The inquiry becomes this, whether the general mass of evidence tending to establish the weakness and imbecility of the testator's mind, or that which tends to establish his competency, such evidence on each side extending through his long life, is entitled to the preference? And in solving such a question it must be admitted that, even in this view of the case, it would be extremely difficult to draw a conclusion from parol evidence so contradictory and conflicting as that in the present case, upon which

General effect of evidence to be regarded.

(*b*) *Tatham* v. *Wright*, 2 Russ. & M. 20 *et seq.*; and cf. *Towart* v. *Sellers*, 5 Dow, 231.

Character and opportunities of the witnesses.

reliance could be placed with perfect safety. If, however, it were absolutely necessary to decide this question on the judgment and opinion of the witnesses examined on each side as to the capacity of the testator, much would depend on the situation in life and character of the respective witnesses, on the opportunities they respectively had to form any judgment upon the testator's understanding, and their ability to form a correct judgment; upon the degree of intimacy between the respective witnesses and the testator, the nature of their intercourse and their habits of life together; upon the period during which their acquaintance continued, and, above all, the comparative closeness with which it is brought down to the time of making the will and codicil. Where the question is left in doubt upon the parol testimony, and the facts of the case will warrant it, it is the safer course to try the question by the evidence of collateral facts which are not involved in the contradiction raised by the parol evidence. Such an appeal at the same time, resolves directly the question at issue between the parties, and also determines incidentally to which class of witnesses, where they are repugnant and contradictory, the preference is to be given. Such was the rule applied by Lord Redesdale, in the case of *Towart* v. *Sellers* (*c*), and it is obviously a rule founded on sound reason and common sense."

Collateral facts.

(*c*) 5 Dow, 231.

APPENDIX.

PART I.

THE PRINCIPAL STATUTORY ENACTMENTS RELATING TO LUNATICS UNDER THE CARE AND CUSTODY OF THE JUDGE IN LUNACY.

PREROGATIVA REGIS (*a*).

XI. *Rex habet custodiam terrarum fatuorum naturalium capiendo exitus earundem sine vasto et destruccione et inveniet eis necessaria sua de cujuscumque feodo terræ illæ fuerint, et post mortem eorum reddat eas rectis heredibus, ita quod nullatenus per eosdem fatuos alienentur vel eorum heredes exheredentur.*

XII. *Item habet providere quando aliquis qui prius habuit memoriam et intellectum non fuerit compos mentis, sicut quidam sunt per lucida intervalla, quod terræ et tenementa eorundem salvo custodiantur sine vasto et destruccione, et quod ipse et familia sua de exitibus earundem vivant et sustineantur competenter et residuum ultra sustentationem eorundem rationabilem custodiatur ad opus ipsorum liberandum eis quando memoriam recuperaverint. Ita quod prædictæ terræ et tenementa infra prædictum tempus non alienentur. Nec rex de exitibus aliquid percipiat ad opus suum, et si obierit in tali statu tunc illud residuum distribuatur pro anima ejusdem per consilium ordinariorum.*

THE STATUTE OF PREROGATIVES (*a*).

XI. The king shall have the custody of the land of natural fools, taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden. And after the death of such idiots he shall render it to the right heirs, so that such idiots shall not aliene nor their heirs shall be disinherited.

XII. Also the king shall provide when any (that before time hath had his wit and memory) happen to fail of his wit, as there are many *per lucida intervalla*, that their lands and tenements shall be safely

(*a*) See Bk. I. Pt. i., generally; but particularly, pp. 25—27, 47, 146 *et seq.*, 162.

kept without waste or destruction, and that they and their households shall live and be maintained competently with the profits of the same, and the residue beside their sustentation shall be kept to their use to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened and the king shall take nothing to his own use; and if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary.

THE LUNACY ACT, 1890 (53 Vict. c. 5).

Judicial Inquisition as to Lunacy (*a*).

The Inquisition.

Order for inquisition as to lunacy.

90.—(1) The judge in lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.

(2) Where the alleged lunatic is within the jurisdiction, he shall have notice of the application and shall be entitled to demand an inquiry before a jury (*b*).

(3) Upon the hearing of the application, the alleged lunatic may withdraw any demand for a jury made by him (*c*).

Demand of a jury by alleged lunatic.

91. Where the alleged lunatic demands a jury, the judge in lunacy shall in his order for inquisition direct the return of a jury, unless he is satisfied, by personal examination of the alleged lunatic, that he is not mentally competent to form and express a wish for an inquisition before a jury; and the judge may, where he deems it necessary, and for the purpose of personal examination, require the alleged lunatic to attend him at such convenient time and place as he may appoint (*d*).

Cases where a jury may be dispensed with.

92. Where the alleged lunatic does not demand a jury, or the judge in lunacy is satisfied by a personal examination that he is not mentally competent to form and express a wish in that behalf, and it appears to the judge, upon consideration of the evidence, and of the circumstances of the case, to be unnecessary or inexpedient that the inquisition should be before a jury, and he accordingly does not in his order for inquisition direct the return of a jury, then the masters shall, without a jury, personally examine the alleged lunatic, and take such evidence, upon oath or otherwise, and call for such information as they think fit or the judge directs, in order to ascertain whether or not the alleged lunatic is of unsound mind, and shall certify their finding thereon (*e*).

Jury to be had, if masters certify that it is expedient.

93. Where the judge in lunacy does not in his order for inquisition direct the return of a jury, but the masters, upon consideration of the evidence, certify that in their opinion an inquisition before a jury is expedient, they shall, without further order, issue their pre-

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(*a*) The provisions in s. 4 of the L. Act, 1890, as to the reception of private patients do not apply to lunatics so found. By s. 50 of the same act the Commissioners have power to direct inquiries as to the property of persons detained as lunatics.

(*b*) Pages 49, 60.

(*c*) Page 50.

(*d*) Pages 49, 50.

(*e*) Pages 49, 51.

cept to the sheriff, and shall proceed in like manner in all respects, and their proceedings shall be as valid and effectual as if the judge had directed the return of a jury in the first instance (*f*).

Inquiries before a jury may be made by means of an issue in the High Court.

94.—(1) Wherever the judge in lunacy orders an inquisition before a jury, he may by his order direct an issue to be tried in the High Court, and the question in such issue shall be, whether the alleged lunatic is of unsound mind and incapable of managing himself or his affairs; and the provisions of this act with respect to commissions of lunacy, and orders for inquisition to be tried by a jury, and the trial thereof, and the constitution of the jury, shall apply to any issue to be directed as aforesaid, and the trial thereof, and subject thereto and to the provisions of this act such issue and the trial thereof shall be regulated by the rules of the supreme court for the time being in force relating to the trial of issues of fact by a jury, and the verdict upon any such issue finding the alleged lunatic to be of unsound mind and incapable of managing himself or his affairs shall have the same effect as an inquisition under this act (*g*).

(2) On the trial of every such issue the alleged lunatic shall, if he is within the jurisdiction, be examined before the evidence is taken, and at the close of the proceedings, before the jury consult as to their verdict, unless the judge who tries the issue otherwise directs; and such examinations shall take place either in open court or in private as such judge directs (*h*).

Certificate of masters without a jury to have the force and effect of an inquisition.

95. Where the masters certify that the alleged lunatic is of unsound mind, and incapable of managing himself or his affairs, or that he is of sound mind, and capable of managing his affairs, the certificate shall have the same effect as an inquisition taken upon the oath of a jury (*i*).

Jury to be had if lunatic out of jurisdiction.

96. Where the alleged lunatic is not within the jurisdiction it shall not be necessary to give him notice of the application for inquisition, and the inquisition shall be before a jury (*k*).

Number of jury.

97. The lord chancellor may, by order, regulate the number of jurors to be sworn, but so that every inquisition upon the oath of a jury be found by the oaths of twelve men, at least (*l*).

Nature and limit of inquisitions.

98.—(1) The inquisition shall be confined to the question whether or not the alleged lunatic is at the time of the inquisition (*m*) of unsound mind, and incapable of managing himself or his affairs (*n*), and no evidence as to anything done or said by him, or as to his demeanour or state of mind at any time, being more than two years before the time of the inquisition, shall be receivable in proof of insanity, or on the trial of any traverse of an inquisition, unless the person executing the inquisition otherwise directs (*o*).

(2) If upon such inquisition it appears that the alleged lunatic is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, it may be so specially found and certified (*p*).

(*f*) Page 50.
(*g*) Page 51.
(*h*) Page 70.
(*i*) Page 72.
(*k*) Pages 49, 54, 59.
(*l*) Page 68.
(*m*) Page 26.
(*n*) Pages 17, 20.
(*o*) Pages 20, 52, 69, 84, 412.
(*p*) Pages 69, 104.

Power of person executing inquiry.

99. The person executing an inquisition with a jury shall, while so employed, have all the powers, authorities, and discretion of a judge of the High Court.

Inquisition may be ordered on report of Commissioners.

100. Where the commissioners report to the lord chancellor that they are of opinion that the property of any person detained or taken charge of as a lunatic, but not so found by inquisition, is not duly protected, or that the income thereof is not duly applied for his benefit, or to the same effect, the report shall be filed with the masters, and shall be deemed to be an application for inquisition supported by evidence, and the alleged lunatic shall have notice of the report from such person as the judge in lunacy directs, and the case shall proceed and be conducted as nearly as may be in all respects as is herein-before directed upon an application for inquisition (*q*).

Traverse and Supersedeas of an Inquisition.

Applications for traverse to be made within a limited time.

101.—(1) Any person desiring to traverse an inquisition, not being a verdict upon an issue tried in the High Court, may, within three months next after the day of the return of the inquisition, apply for that purpose to the judge in lunacy.

(2) The judge shall hear and determine the application, and shall in his order upon it for a traverse limit a time, not exceeding six months from the date of the order, within which the person desiring to traverse and all other proper parties are to proceed to trial of the traverse.

(3) The judge may by the same or any other order direct that the person desiring to traverse, not being the person the object of the inquisition, shall within three weeks next after the date of the order, give sufficient security to and to the satisfaction of the masters for all proper parties proceeding to trial within the time to be limited as aforesaid (*r*).

Persons not proceeding to trial within limited time barred.

102. Every person who does not within the appointed time apply for a traverse, or who refuses or neglects to give such security as aforesaid, or who does not proceed to trial within the appointed time, shall be absolutely barred of the right of traverse : Provided that the judge in lunacy may, under the special circumstances of any particular case, extend the time upon such terms as he thinks just (*s*).

Judge may direct new trials.

103. If the judge in lunacy is dissatisfied with the verdict returned upon a traverse, he may order one or more new trial or trials thereon, as he thinks fit ; but no person shall be admitted to traverse oftener than once (*t*).

New trial of an issue.

104. A traverse of a verdict upon an issue tried in the High Court shall not be allowed, but the judge in lunacy may, if he thinks fit, upon application within three months next after the trial of any such issue, order a new trial of the issue, or a new inquisition as to the insanity of the alleged lunatic, subject to such directions and upon such conditions as to the judge may seem proper (*u*).

(*q*) Pages 57, 60, 226.
(*r*) Page 77.
(*s*) Page 77.
(*t*) Page 81.
(*u*) Page 82.

Commission may be superseded on conditions.

105. If it appears to the judge in lunacy that it is not expedient or for the benefit of the lunatic that the commission should be unconditionally superseded, but that the same should be superseded on terms and conditions, he may, upon the consent of the lunatic and any other persons whose consent he deems necessary, order the commission to be superseded upon such terms and conditions as he thinks proper, and the judge may make such orders as he thinks fit for giving effect to such terms and conditions (*x*).

Power to supersede inquisition as regards commitment of person.

106.—(1) The judge in lunacy, if satisfied by a report of the commissioners, or of one of the chancery visitors, or on any other evidence, that a lunatic so found by inquisition is cured or capable of managing himself, and not dangerous to himself or others, though incapable of managing his affairs, may, if he thinks it desirable that the ordinary proceedings for a supersedeas should not be insisted on, by order supersede the inquisition, so far as the same finds that the lunatic is incapable of managing himself, and rescind or vary any order for the commitment of the person of the lunatic (*y*).

(2) An order under this section may be made on such terms and conditions as the judge thinks fit (*z*).

(3) Notice of an order under this section shall be forthwith given to the committee of the person of the lunatic, and also to the person under whose care the lunatic is (*a*).

Transmission of Inquisition and Supersedeas to Ireland and England.

Transmission of inquisition and supersedeas to Ireland and England.

107. Where it is desired that an inquisition taken, or a writ of supersedeas issued in England or Ireland, should be acted upon in Ireland or England, the proper officer may, under order of the judge in lunacy in England, or the lord chancellor for the time being entrusted by the sign manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics in Ireland, as the case may be, transmit a transcript of the record of the inquisition, or of the writ, to the registrar in lunacy in Ireland or the High Court in England, as the case may be, which transcript shall thereupon be entered and be of record there respectively, and shall, when so entered of record, and if and so long only as the lord chancellor entrusted as aforesaid in Ireland and the judge in lunacy in England, as the case may be, thinks fit, be acted upon by them respectively, and be of the same validity and effect, to all intents and purposes, as if the inquisition had been taken or the writ issued in Ireland or England respectively (*b*).

Judicial Powers over Person and Estate of Lunatics.

The Judge in Lunacy.

Jurisdiction of judge in lunacy.

108.—(1) The jurisdiction of the judge in lunacy under this act shall be exercised either by the lord chancellor for the time being entrusted by the sign manual of Her Majesty with the care and

(*x*) Pages 83, 204, 206.
(*y*) Pages 83, 206.
(*z*) Pages 204, 206.
(*a*) Page 206.
(*b*) Page 32.

commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such judges as aforesaid (*c*).

(2) The judge in lunacy may make orders for the custody of lunatics so found by inquisition and the management of their estates, and every such order shall take effect as to the custody of the person immediately, and as to the custody of the estate upon the master's certificate of completion of the committee's security (*d*).

(3) Where upon the inquisition it is specially found or certified that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, the judge in lunacy may make such orders as he thinks fit for the commitment of the estate of the lunatic and its management, including all proper provisions for the maintenance of the lunatic, but it shall not be necessary, unless in the discretion of the judge it appears proper to do so, to make any order as to the custody or commitment of the person of the lunatic (*e*).

(4) Any order under this section may be made notwithstanding proceedings are pending for a traverse or new trial, and any person acting upon an order so made shall be indemnified as effectually as if there had been no right of traverse or new trial (*f*).

Costs.

109. The costs of all proceedings for the purpose of ascertaining whether a person is lunatic, and of all proceedings in the matter of a lunatic shall be in the discretion of the judge in lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the judge thinks fit, or by any other party to the proceedings ; and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued, and every such order shall have the effect of an order of the High Court (*g*).

Powers to extend to British possessions.

110. The powers and authorities given by this act to the judge in lunacy shall extend to property within any British possession (*h*).

The Masters.

Masters in Lunacy.

111.—(1) There shall continue to be masters in lunacy as heretofore (*i*) and they shall, subject to the provisions of this act and the rules in lunacy execute and perform the same powers and duties as heretofore, and shall perform such other duties for the benefit of lunatics and their estates as the lord chancellor may direct.

(2) The powers and authorities of the masters shall be joint and several, and they shall execute commissions and conduct inquiries connected with lunatics or their estates, and perform all other duties

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(*c*) Page 30.
(*d*) Pages 83, 98, 104, 108, 115, 126.
(*e*) Pages 83, 104, 115.
(*f*) Page 83.
(*g*) Pages 83, 181, 185, 217, 219, 223.
(*h*) Page 31.
(*i*) Pages 33 *et seq.*

committed to them, either separately or together, and at such places, within such times, and in such manner as the rules in lunacy, and, subject thereto, as the judge in lunacy may by any special order direct (*k*).

(3) A master must be a barrister of not less than ten years' standing, and shall be appointed by the lord chancellor.

(4) A master shall, before being capable of acting, make before the lord chancellor, in the manner now used, the declaration to be made by a master set forth in the First Schedule.

(5) The masters shall have such clerks and officers as the lord chancellor may, with the concurrence of the treasury as to number and salaries, determine.

(6) The salaries of the masters, their clerks and officers, and their expenses to the amount sanctioned by the treasury, shall be paid out of moneys provided by parliament.

Commission of inquiry.

112. A general commission of inquiry with such variations as may be expedient, may from time to time be issued in duplicate under the Great Seal, directed to the masters by name, jointly and severally, who shall by virtue thereof proceed, in each case of alleged lunacy concerning which the judge in lunacy orders them to inquire, in like manner and with all the like powers and authorities (subject to the provisions in this act contained) as heretofore (*l*).

Special commission may issue.

113. The Lord Chancellor may issue a commission specially to any person or persons alone or in addition to the masters, or one of them, if upon any occasion he thinks it proper to do so; and the provisions of this act so far as applicable shall extend to every commission so issued specially (*m*).

Power to summon witnesses.

114. The masters may administer any oath and take any affidavit and may summon any person to give evidence before them, and every person so summoned shall be bound to attend as required by the summons (*n*).

Expiration of Orders for the Commitment of Person.

Order for custody of person of lunatic so found to determine unless continued.

115.—(1.) The medical attendant of every lunatic so found by inquisition shall, before the expiration of one, three, and six years respectively from the commencement of this act, and before the expiration of every subsequent period of five years after the expiration of six years from the commencement of this act, send to the masters a report as to the mental and bodily condition of the patient, with a certificate under his hand certifying, if it is the fact, that the patient is still of unsound mind and a proper person to be detained under care and treatment.

(2) If, before the expiration of any of the periods herein-before mentioned, such report and certificate are not sent to the masters, they shall inquire as to the omission, and unless they are satisfied that the lunatic is still of unsound mind, the order for the commitment of the person of the lunatic as to whom such report and certificate are not sent shall determine at the expiration of such

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(*k*) Page 34.
(*l*) Page 48.
(*m*) Page 48.
(*n*) Pages 35, 69.

period ; but nothing herein contained shall affect the commitment of the estate.

(3) A master may, by order under his hand, extend the time within which any report and certificate under this section is to be sent to the masters, and if the time is so extended, the order for commitment of the person of the lunatic as to whom the time is so extended shall continue in force until the expiration of the extended time, but such extended time shall not exceed six months.

(4) Where any order for commitment of the person of a lunatic has determined under this section, the masters shall forthwith give notice of such determination to the committee of the person of the lunatic and to the person under whose care the lunatic is (*o*).

Management and Administration.

Extent of the administrative powers of the judge in lunacy.

116.—(1) The powers and provisions of this part of this act relating to management and administration apply :—

(a) To lunatics so found by inquisition ;

(b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this act (*p*) ;

(c) To every person lawfully detained as a lunatic though not so found by inquisition (*q*) ;

(d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs (*r*) ;

(e) To every person with regard to whom it is proved to the satisfaction of the judge in lunacy by the certificate of a master, or by the report of the commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed two thousand pounds in value, or that the income thereof does not exceed one hundred pounds per annum (*s*) ;

(f) To every person with regard to whom the judge is satisfied by affidavit or otherwise that such person is or has been a criminal lunatic and continues to be insane and in confinement (*t*).

(2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this act as are made exerciseable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge (*u*).

(3) Every person appointed to do any such act or exercise any such power shall be subject to the jurisdiction and authority of the

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(*o*) Page 145.
(*p*) Page 230.
(*q*) Page 230.
(*r*) Page 230.
(*s*) Pages 226, 236.
(*t*) Page 230.
(*u*) Page 229.

judge as if such person were the committee of the estate of a lunatic so found by inquisition (*x*).

(4) The powers of this act relating to management and administration shall be exerciseable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic (*y*).

(5) Nothing in this act shall subject a lunatic's property to claims of his creditors further than the same is now subject thereto by due course of law.

Power to raise money for certain purposes.

117.—(1) The judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following :—

(a) Payment of the lunatic's debts or engagements ;

(b) Discharge of any incumbrance on his property (*z*) ;

(c) Payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit ;

(d) Payment of or provision for the expenses of his future maintenance (*a*).

(2) In case of a charge or mortgage being made under this act for the expenses of future maintenance, the judge may direct the same to be payable, either contingently if the interest charged is a contingent or future one, or upon the happening of the event if the interest is depending on an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times and in such manner as he thinks expedient (*b*).

Charge for permanent improvements.

118.—(1) The judge may order that the whole or any part of any moneys expended or to be expended under his order for the permanent improvement, security, or advantage of the property of the lunatic, or of any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic, but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge (*c*).

(2) The interest shall be kept down during the lunatic's lifetime, out of the income of his general estate, as far as the same is sufficient to bear it (*d*).

(3) The charge may be made either to some person advancing the money, or if the money is paid out of the lunatic's general estate, to some person as a trustee for him, as part of his personal estate.

Power to dissolve partnership.

119. Where a person being a member of a partnership becomes lunatic the judge may, by order, dissolve the partnership (*e*).

Powers exerciseable by committee under order of judge.

120. The judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things :—

(a) Sell any property belonging to the lunatic (*f*) ;

(*x*) Pages 229, 230.
(*y*) Pages 227, 229.
(*z*) Page 167.
(*a*) See, generally, pages 154, 163, 181, 182, 190, 223.
(*b*) Page 183.
(*c*) Pages 165, 167, 363.
(*d*) Page 165.
(*e*) Pages 278, 279.
(*f*) Pages 180, 183, 186.

(b) Make exchange or partition of any property belonging to the lunatic or in which he is interested, and give or receive any money for equality of exchange or partition (*g*) ;

(c) Carry on any trade or business of the lunatic (*h*) ;

(d) Grant leases of any property of the lunatic for building, agricultural, or other purposes (*i*) ;

(e) Grant leases of minerals forming part of the lunatic's property whether the same have been already worked or not, and either with or without the surface or other land (*k*) ;

(f) Surrender any lease and accept a new lease (*l*) ;

(g) Accept a surrender of any lease and grant a new lease (*l*) ;

(h) Execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends (*m*) ;

(i) Perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy (*n*) ;

(j) Surrender, assign, or otherwise dispose of with or without consideration any onerous property belonging to the lunatic ;

(k) Enter into any agreement touching the patronage of augmented cures under the act one George the First, chapter ten, which the lunatic might have entered into if he had been of sound mind ;

(l) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic (*o*).

Property exchanged and renewed lease to be to same uses as before.

121. Any property taken in exchange and any renewed lease accepted on behalf of a lunatic under the powers of this act shall be to the same uses and be subject to the same trusts, charges, incumbrances, dispositions, devises, and conditions as the property given in exchange or the surrendered lease was or would but for the exchange or surrender have been subject to (*p*).

Extent of leasing power.

122.—(1) The power to authorise leases of a lunatic's property under this act shall extend to property of which the lunatic is tenant in tail, and every lease granted pursuant to any order under this act shall bind the issue of the lunatic and all persons entitled in remainder and reversion expectant upon the estate tail of the lunatic including the Crown, and every person to whom from time to time the reversion expectant upon the lease belongs upon the death of the lunatic shall have the same rights and remedies against the lessee, his executors, administrators, and assigns, as the lunatic or his committee would have had.

(2) Leases authorised to be granted and accepted by or on behalf of a lunatic under this act may be for such number of lives or such term of years, at such rent and royalties, and subject to such reservations, covenants, and conditions as the judge approves (*q*).

(3) Fines or other payments on the renewal of leases may be paid

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(*g*) Page 184.
(*h*) Page 189.
(*i*) Page 169.
(*k*) Pages 163, 169
(*l*) Pages 172, 179, 186.
(*m*) Page 170.
(*n*) Page 259.
(*o*) Page 306 ; and see *In Re Harwood*, 35 Ch. D. 470.
(*p*) Pages 179, 184.
(*q*) Pages 172, 179.

out of the lunatic's estate, or charged with interest on the leasehold property (*r*).

Lunatic's interest in property not to be altered.

123.—(1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of (*s*).

(2) Moneys received for equality of partition and exchange, or under any lease of unopened mines, and all fines, premiums, and sums or money received upon the grant or renewal of a lease, where the property the subject of the partition, exchange, or lease was real estate of the lunatic, shall, subject to the application thereof for any purposes authorised by this act, as between the representatives of the real and personal estate of the lunatic, be considered as real estate, except in the case of fines, premiums, and sums of money received upon the grant or renewal of leases of property of which the lunatic was tenant for life, in which case the fines, premiums, and sums of money shall be personal estate of the lunatic (*t*).

(3) In order to give effect to this section the judge may direct any money to be carried to a separate account, and may order such assurances and things to be executed and done as he thinks expedient.

Power to carry orders into effect.

124. The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject (*u*).

Admittance to copyholds.

125. Where a lunatic so found by inquisition is entitled to be admitted tenant of copyhold land, the committee of his estate may appear at one of the three next courts holden for the manor (for the holding whereof the usual notice shall be given), and there offer himself to be admitted tenant in the name and on behalf of the lunatic; and in default of his appearance, or of his acceptance of admittance, the lord or his steward may, after three courts duly holden, and proclamations thereat regularly made, at any subsequent court appoint any fit person to be attorney for the lunatic for that purpose only, and by that attorney admit the lunatic tenant of the land, according to such estate as the lunatic is legally entitled to therein (*x*).

Fines upon admittance.

126.—(1) The lord or his steward may upon the admittance impose such fine as might have been imposed if the lunatic had been of sound mind, which fine may be demanded by the lord's bailiff or agent, by a note in writing signed by the lord or his steward, to be left with the committee of the estate, or with the tenant or occupier of the land (*y*).

(2) If the fine is not paid or tendered to the lord or his steward

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(*r*) Pages 169, 179.
(*s*) Pages 183, 363, 364.
(*t*) Pages 163, 170, 172.
(*u*) Pages 183, 278, 279.
(*x*) Page 177.
(*y*) Page 177.

within three months after demand, then the lord may enter upon and hold the land, and receive the rents and profits thereof, (but without liberty to fell any timber standing thereon,) until he is thereby fully paid the fine, with his reasonable costs and charges of raising the same, and of obtaining the possession of the land, although the lunatic die before the fine and costs and charges have been raised (*z*).

(3) The lord shall yearly, on demand by the person entitled to the surplus rents and profits, after payment of the fine and costs and charges, or by the person then entitled to the land, render an account of the rents and profits received by him or on his behalf, and shall pay the surplus, if any, to the person entitled thereto (*a*).

(4) As soon as the fine and costs and charges have been fully paid, or if after the lord's entry, the fine and costs and charges are lawfully tendered to him, then the lunatic, by the committee of his estate or other the person entitled, may enter upon and hold the land, according to his estate or interest therein ; and the lord shall deliver possession thereof accordingly, and if he refuse so to do he shall make satisfaction to the person kept out of possession for all the damages which he thereby sustains, and all his costs and charges of recovering possession (*b*).

(5) If the committee pays the fine and costs and charges, then he, his executors and administrators, may enter upon and hold the land, and receive the rents and profits thereof until payment thereout of the amount disbursed upon that account, although the lunatic die before reimbursement (*c*).

(6) If the fine imposed is not warranted by the custom of the manor, or is unlawful, the lunatic may controvert its legality, as if this act had not been passed ; and no lunatic so found by inquisition shall forfeit any land for his neglect or refusal to appear at any court, or to be admitted thereto, or to pay the fine imposed upon his admittance (*d*).

Where lunacy temporary money may be applied for temporary maintenance.

127.—(1) Where it appears to the judge that there is reason to believe that the unsoundness of mind of any lunatic so found by inquisition is in its nature temporary, and will probably be soon removed, and that it is expedient that temporary provision should be made for the maintenance of the lunatic, or of the lunatic and the members of his immediate family who are dependent upon him for maintenance, and that any sum of money arising from or being in the nature of income or of ready money belonging to the lunatic, and standing to his account with a banker or agent, or being in the hands of any person for his use, is readily available and may be safely and properly applied in that behalf, the judge may allow thereout such amount as he thinks proper for the temporary maintenance of the lunatic, or of the lunatic and the members of his immediate family who are dependent upon him for maintenance, and may, instead of proceeding to order a grant of the custody of the estate, order or give liberty for the payment of any such sum of money as aforesaid, or any part thereof, to such person as, under the circumstances of the case, he thinks proper to intrust with the application thereof, and may direct the same to be paid to such

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(*z*) Page 177.
(*a*) Pages 177, 178.
(*b*) Page 178.
(*c*) Page 178.
(*d*) Page 178.

person accordingly, and when received to be applied, and the same shall accordingly be applied, in or towards such temporary maintenance as aforesaid.

(2) The receipt in writing of the person to whom payment is to be made for any moneys payable to him by virtue of an order under this section shall be a good discharge, and every person is hereby directed to act upon and obey every such order.

(3) The person receiving any money by virtue of an order under this section shall pass an account thereof before the masters, when required (*e*).

Committee may exercise power vested in lunatic in character of trustee or guardian.

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs (*f*).

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees (*g*).

Temporary provision for maintenance of lunatic.

130. In any case where, pending the appointment of committees, it appears to the masters desirable that temporary provision should be made for the expenses of the maintenance or other necessary purposes or requirements of the lunatic, or any member of his family, out of any cash or available securities belonging to him in the hands of his bankers, or of any other person, the masters shall be at liberty by certificate to authorise such banker or other person to pay to the person to be named in such certificate such sum as they certify to be proper; and may by such certificate give any directions as to the proper application thereof for the lunatic's benefit by that person, who shall be accountable for the same as the masters direct.

Powers as to Property in England, Scotland, and Ireland.

Power to deal with property in England, Scotland, and Ireland.

131.—(1) The powers of management and administration of the estates of lunatics conferred by this act shall, without an inquisition or other proceedings in Ireland, extend to the personal property in Ireland of a lunatic so found by inquisition in England where such personal property does not exceed two thousand pounds in value or the income thereof does not exceed one hundred pounds a year; and

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(*e*) Page 147.
(*f*) Page 294, 305.
(*g*) Page 305.

the like powers conferred by the Lunacy Regulation (Ireland) Act, 1871, shall, without an inquisition or other proceedings in England, extend to the personal property in England of a lunatic so found by inquisition in Ireland where such personal property or the income thereof does not exceed such amount as aforesaid.

(2) Where a person has been found lunatic by inquisition in England or Ireland, and has personal property in Scotland, the committee of the estate of the lunatic shall, without cognition or other proceedings in Scotland, have all the same powers as to such property, or the income thereof, as might be exercised by a tutor at law after cognition or a duly appointed curator bonis to a person of unsound mind in Scotland.

(3) Where a tutor at law after cognition or a curator bonis has been appointed to a lunatic in Scotland, who has personal property in England or Ireland, the tutor at law or curator bonis shall, without an inquisition or other proceedings in England or Ireland, have all the same powers as to such property, or the income thereof, as might be exercised by the committee of the estate of a lunatic, so found by inquisition in England or Ireland.

(4) The powers of management and administration conferred by this act in cases where the property of a person of unsound mind does not exceed two thousand pounds in value, or the income thereof does not exceed one hundred pounds per annum, and the powers conferred by section sixty-eight of the Lunacy Regulations (Ireland) Act, 1871, shall extend to the property in Ireland or England, as the case may be, of the lunatic where the total value of the property in England and Ireland does not exceed two thousands pounds in value, or the income thereof does not exceeed one hundred pounds a year (*h*).

34 & 35 Vict. c. 22, s. 68.

Power of County Court Judge.

Power to deal with property of small amount.

132.—(1) Where a reception order is made in the case of a lunatic the value of whose real and personal property is under two hundred pounds, and no relative or friend of the lunatic is willing to undertake the management of such property, any judge of county courts having jurisdiction in the place from which the lunatic is sent, may, upon the application of the clerk of the guardians, or a relieving officer of the union from which the lunatic is sent, authorise the clerk or relieving officer, or such other person as the judge by his order appoints, to take possession of and sell and realise the real and personal property of a lunatic, and to exercise all the powers which could be exercised by the legal personal representative of the lunatic if he were dead; and the receipt of the person so authorised shall be a valid discharge to any person who pays any money or delivers any property of the lunatic to such person.

(2) The judge, by whom such order is made, may by the same or any subsequent orders give such directions as he thinks fit as to the application of the property of the lunatic for his benefit or in reimbursement of such sums as may have been or may be expended by the guardians of the union for his care or relief, or of the costs or expenses incurred in relation to the lunatic by such guardians, or by the person acting under any such order as aforesaid, or the judge may,

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(*h*) Pages 55, 192, 193, 226, 231, n. (*m*), 232, n. (*q*) and (*u*), 324.

if he thinks fit, order that the whole or any part of the proceeds of the lunatic's property be paid into the county court to the credit of an account intituled in the matter of such lunatic, and any sum so paid into court may either be invested in the manner provided by the county court rules in force for the time being, or be paid out of court from time to time to such person as the judge directs, to be held and applied for the benefit of such lunatic, or in or towards such reimbursement as aforesaid, in such manner as the judge directs.

(3) The person acting under any such order shall render an account of his dealings with the lunatic's property to the judge by whom such order was made in such manner as the judge appoints (*i*).

Vesting Orders (*k*).

Power to transfer stock of lunatic.

133. Where any stock is standing in the name of or is vested in a lunatic beneficially entitled thereto, or is standing in the name of or vested in a committee of the estate of a lunatic so found by inquisition, in trust for the lunatic, or as part of his property, and the committee dies intestate, or himself becomes lunatic, or is out of the jurisdiction of the High Court, or it is uncertain whether the committee is living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof as the judge in lunacy directs, then the judge may order some fit person to transfer the stock to or into the name of a new committee or into court or otherwise, and also to receive and pay over the dividends thereof in such manner as the judge directs (*l*).

Stock in name of lunatic out of the jurisdiction.

134. Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit (*m*).

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

135.—(1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the judge in lunacy may by order vest such land in such person or persons for such estate and in such manner, as he directs (*n*)

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs (*o*).

(3) An order under sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right (*p*).

(4) In all cases where an order can be made under this section the

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(*i*) Pages 31, 194, 226, 239.
(*k*) Page 281, and generally Book II. ch. iv.
(*l*) Pages 190, 191.
(*m*) Page 231.
(*n*) Page 285.
(*o*) Page 286.
(*p*) Page 286.

judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2) (*q*).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance (*r*).

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things (*s*).

Power to vest right to transfer stock and sue for chose in action.

136.—(1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action (*t*).

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons (*u*).

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint (*x*).

(4) In all cases where an order can be made under this section, the Judge may, if it is more convenient, appoint some proper person to make or join in making the transfer (*y*).

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor (*z*).

(6) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock

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(*q*) Page 286. Where the lunatic is one of several trustees or mortgagees, see *In re Jones*, 33 Ch. D. 414.

(*r*) Page 286.

(*s*) Page 287.

(*t*) Pages 287, 288.

(*u*) Pages 287, 288.

(*x*) Pages 287, 288.

(*y*) Page 287.

(*z*) Pages 287, 288.

to which the order relates or to pay any dividends thereon except in accordance with the order (*a*).

Person to be appointed to transfer.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred (*b*).

Charity trustees.

138. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction (*c*).

Declarations and directions.

139. The judge in lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised (*d*).

Order to be conclusive evidence of allegation on which it is founded.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a Judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained (*e*).

Power to appoint new trustees.

141. In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees (*f*).

Costs.

142. The judge in lunacy may order the costs of and incident to obtaining an order under the provisions of this act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the judge may think fit (*g*).

Saving of power of High Court.

143. The provisions of this act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant (*h*).

Orders of Judge in Lunacy and Certificates of Masters.

Office copies to be evidence.

144. Every office copy of the whole of an order or report confirmed by fiat purporting to be signed by a master, and sealed or stamped with the seal of the masters' office, and every office copy of a certificate in lunacy shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted as evidence of the order, report, or certificate of which it purports to be a copy, without any further proof thereof (*i*).

Money orders to be acted upon.

145. Where an order relates to the payment, transfer, carrying

(*a*) Page 288.
(*b*) Page 191.
(*c*) Page 289.
(*d*) Page 288.
(*e*) Page 281, n. (*h*).
(*f*) Page 289.
(*g*) Page 302.
(*h*) Pages 235, 289.
(*i*) Page 39.

over, or depositing of any cash, stocks, funds, annuities, securities, or other effects into or in court to the credit of the matter of a lunatic, or to the payment, transfer, or carrying over, or other disposal by the paymaster-general of any cash, stocks, funds, annuities, securities, or other effects standing in his name or deposited in his custody to the credit of the matter of a lunatic, or of any cash, stocks, funds, annuities, securities, or other effects to or in which a lunatic is entitled or beneficially interested, and which are not standing to the credit of a cause or matter depending in the High Court, the paymaster-general and the bank, and all other persons, shall act upon an office copy of the order (*k*).

Transfers to be binding.

146. All transfers and payments made in pursuance of this act under an order or a master's certificate shall be valid and binding on all persons (*l*).

Forgery of signature of master or seal of master's office.

147. If any person forges the signature of a master, or forges or counterfeits the seal of the masters' office, or knowingly concurs in using any such forged or counterfeited signature or seal, or tenders in evidence any document with a false or counterfeit signature of a master, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall upon conviction be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding three years with or without hard labour.

Percentage and Fees.

Percentage and fees.

148.—(1) The lord chancellor, with the concurrence of the treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid.

(2) Save as otherwise provided by the rules in lunacy the percentage and fees in lunacy shall be subject to the rules contained in section twenty-six of the Supreme Court of Judicature Act, 1875.

(3) The percentage, or a proper proportionate part thereof (as the case may require), shall be charged upon the estate of a lunatic, and be payable thereout, although before payment thereof he die, or the inquisition be superseded, or be vacated and discharged on a traverse; but in either of the two last-mentioned cases the judge in lunacy may, if he thinks fit, remit or reduce the amount of the sum to be paid.

38 & 39 Vict. c. 77.

(4) Where it is made to appear to the judge in lunacy that the property of a lunatic does not exceed seven hundred pounds in value, or that the income thereof does not exceed fifty pounds per annum, he may order (if he thinks fit) that no fee shall be taken, or percentage levied, in relation to the proceedings in the matter or the property, as from the date of the order or such other time as he directs, during the continuance of the lunacy or until further order (*m*).

Extent of power to fix percentage and fees.

149. The provisions of this act as to percentage and fees shall extend—

(a) To lunatics so found by inquisition:

(*k*) Pages 39, 40.
(*l*) Page 191.
(*m*) Pages 45, 46, infra, 475.

(b) To lunatics for the administration of whose property an order has been made before the commencement of this act, or may hereafter be made under this act :

(c) To lunatics under the protection of the judge in lunacy by virtue of the transmission of the record of an inquisition from Ireland, and its entry of record in the High Court :

(d) To persons residing out of England, and declared lunatic according to the laws of their place of residence, where the judge in lunacy makes an order affecting the property of such persons or any part thereof.

Provided that in the two last-mentioned cases no percentage shall be levied except in respect of income arising from property within the jurisdiction of the judge in lunacy, and administered under his direction (*n*).

Visitors of Lunatics.

The Chancery Visitors.

Appointment and qualification of Chancery Visitors.

163.—(1) There shall continue to be medical and legal visitors of lunatics so found by inquisition, and they are in this act referred to as the chancery visitors (*o*).

(2) The lord chancellor may, when a vacancy occurs in the office of medical visitor or legal visitor, appoint, by writing under his hand, a fit person, being a medical practitioner in actual practice, to succeed a medical visitor, and a fit person, being a barrister of not less than five years' standing, to succeed a legal visitor (*p*).

(3) The visitors shall have such clerks and officers as the lord chancellor may, with the concurrence of the treasury as to number and salaries, determine (*q*).

(4) The salaries of the chancery visitors, their clerks and officers, and their expenses to the amount sanctioned by the treasury, shall be paid out of moneys provided by parliament.

Tenure of office by Chancery Visitors.

164. The chancery visitors may be removed by the lord chancellor in case of misconduct or neglect in the discharge of their duties, or of their being disabled from performing the same, and they shall not be engaged in the practice of their respective professions (*r*).

Visitors not to be interested in licensed houses.

165. A person shall not be appointed a chancery visitor if he is or has been within the two years preceding his appointment directly or indirectly interested in any licensed house ; and if any person after his appointment becomes so interested, his appointment shall become void, and thereupon his salary shall cease (*s*).

Masters to be ex-officio visitors.

166. The masters for the time being shall by virtue of their office be visitors of lunatics so found by inquisition, jointly with the chancery visitors (*t*).

The Visitors and Masters to form a board.

167.—(1) The chancery visitors and the masters, or so many of them, not being less than three in number, as may from time to

(*n*) Pages 45, 55.
(*o*) Page 42.
(*p*) Page 42.
(*q*) Page 44.
(*r*) Page 42.
(*s*) Page 42.
(*t*) Page 42.

time be able, consistently with the discharge of their other duties, to attend, shall from time to time form themselves into a board for their mutual guidance and direction on matters connected with the visiting of lunatics.

(2) The board may report to the lord chancellor upon any matter connected with the duties of the chancery visitors or of the board, as they think proper (*u*).

Medical or legal visitor may appoint a substitute.

168.—(1) Where a medical or a legal chancery visitor is temporarily prevented from discharging his duty by illness or unavoidable absence, but not otherwise, he may, with the approbation of the lord chancellor, appoint a medical practitioner in actual practice, or a barrister of not less than five years' standing (as the case may require), to act in his stead during his illness or unavoidable absence.

(2) The medical practitioner or the barrister so appointed shall, while his appointment remains in force, have, perform, and execute all the powers, duties, and authorities belonging to the office of medical or legal visitor (as the case may be) with full validity and effect to all intents and purposes.

Visitation.

Duties of Chancery Visitors.

Duties of Chancery Visitors.

183.—(1) The chancery visitors shall visit lunatics so found by inquisition at such times, and in such rotation and manner, and make such inquiries and investigations as to their care and treatment and mental and bodily health, and the arrangements for their maintenance and comfort, and otherwise respecting them, as the rules in lunacy, or as any special order of the judge in lunacy in any particular case, shall from time to time direct (*x*).

(2) Provided that every lunatic shall be personally visited and seen by one of the chancery visitors twice at least in every year, and such visits shall be so regulated as that the interval between successive visits to any such lunatic shall in no case exceed eight months (*y*).

(3) Provided also, that every lunatic resident in a private house shall, during the two years next following inquisition, be visited at least four times in every year (*z*).

Chancery Visitors to visit alleged lunatics.

184.—(1) The chancery visitors shall also visit such persons alleged to be lunatics, and shall make such inquiries and reports in reference to them as the judge in lunacy directs, and at the expiration of every six months they shall report to the lord chancellor the number of visits made, the number of patients seen, and the number of miles travelled during such months, and shall on the first of January in each year make a return to the lord chancellor of all sums received by them for travelling expenses, or upon any other account (*a*).

(2) A copy of every report and return under this section shall be

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(*u*) Page 44.
(*x*) Pages 42, 109.
(*y*) Pages 42, 109.
(*z*) Page 42.
(*a*) Page 44.

laid before parliament on or before the first of February in each year, if parliament be then sitting, and if not, within twenty-one days next after the commencement of the next session (*c*).

Chancery Visitors to report to Lord Chancellor.

185.—(1) The chancery visitors shall respectively, within a convenient time after each visit, make a report in writing of the state of mind and bodily health and of the general condition and also of the care and treatment of each person visited, which reports shall, annually or oftener, as the lord chancellor directs or the board of visitors think expedient, be submitted to the lord chancellor (*d*).

(2) The chancery visitors respectively shall make separate or special reports on any case to the lord chancellor as and when they or the board of visitors think expedient, and in particular shall report to him, without delay, any instance in which, on proceding to visit, they have been unable to discover the residence of or have been by any other circumstance prevented from actually seeing on that occasion the lunatic whom they intended to visit (*e*).

Reports to be kept secret.

186.—(1) The reports of the chancery visitors shall be filed and kept secret in their office, and shall not be open to the inspection of any person save the members of the board of visitors, and the judge in lunacy and such persons as he specially appoints (*f*).

(2) All the reports relating to any particular patient shall be destroyed on his death, and shall also be destroyed on the inquisition in his case being superseded, or being vacated and discharged on a traverse, unless the judge in lunacy within fourteen days after the supersedeas, or the vacating and discharge on a traverse, specially orders that the same be not destroyed until the lunatic's death.

Miscellaneous Provisions, Definitions, Repeal.

Indemnity to Bank and others.

333. This act, and every order purporting to be made under this act, shall be a full indemnity and discharge to the bank and every other company and society and their respective officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto, or pursuant to the rules under this act, so far as relates to any property in which a lunatic is interested either in his own right, or as trustee or mortgagee, and it shall not be necessary to inquire into the propriety of any order purporting to be made under this act relating to any such property or the jurisdiction to make the same.

Meaning of word commission in other Acts extended.

334. Where in any act of parliament, order or rule of court, or instrument, reference is made to a commission of lunacy, or the inquisition thereon, the general commission and the inquisition, or certificate operating us an inquisition, and the issue and verdict thereon respectively in this act mentioned, shall be deemed to be included in the reference (*g*).

Pension of lunatic payable by public department.

335. When any sum in respect of pay, pension, superannuation, or other allowance, or annuity under the control or management of any public department, is payable to any person, in respect either of service as a civil servant or of military or naval service or of pro-

(*c*) Page 43.
(*d*) Page 43.
(*e*) Pages 44, 111.
(*f*) Page 44.
(*g*) Pages 48, 51.

vision for a widow or child of a person employed in civil, military, or naval service, and the person to whom the sum is payable is certified by a justice or minister of religion, and by a medical practitioner, to be unable by reason of mental disability to manage his or her affairs, the public department may pay so much of the said sum as the department may think fit to the institution or person having the care of the disabled person, and may pay the surplus, if any, or such part thereof, as the department may think fit, for or towards the maintenance and benefit of the wife or husband and relatives of the disabled person, and the department shall be discharged from all liability in respect of any sums so paid.

Forms 16, 17.

Power to amalgamate the lunacy departments.

337.—(1) The lord chancellor may, if it seems expedient to him so to do, by order under his hand, amalgamate the office of the masters and their staff, and the office of the chancery visitors and their staff, and may amalgamate such offices, or either of them, with the office of the commissioners, and may give such directions as he may think fit for the reconstitution of the commissioners, and for the exercise and performance of the powers and duties of the commissioners, and of the officers and staff amalgamated respectively under any order under this section.

(2) In the event of any such amalgamation, the lord chancellor may, with the concurrence of the treasury, fix the qualifications and salaries of the members of the amalgamated office and of the staff attached thereto, and may, with such concurrence, increase or diminish the number of such members and staff.

(3) An order under this section shall not be made so as to prejudice the rights of the masters, visitors, and commissioners respectively holding office at the passing of this act.

(4) The lord chancellor may by order direct that such proportion as he may consider reasonable of the expenses incurred in carrying any such amalgamation into effect, including the cost of providing office accommodation, shall be paid out of the percentage charged on the incomes of lunatics (*h*).

Power to make rules.

338.—(1) It shall be lawful for the commissioners, with the approval of the lord chancellor, by rules, to prescribe the books to be kept in institutions for lunatics and houses for single patients, and the entries to be made therein, and the returns, reports, extracts, copies, statements, notices, plans, documents, and information to be sent to the commissioners or any authority or person, and the persons by whom, the times within which, and the manner in which, such entries, returns, reports, extracts, copies, statements, notices, plans, documents, and information are to be made and sent; and also by rules to prescribe forms for the purposes aforesaid in addition to or in substitution for any forms now in use.

(2) Subject to the preceding sub-section, the lord chancellor may make rules in lunacy for carrying this or any other act relating to lunacy into effect, and also for regulating costs in relation thereto.

(3) Where by any act already passed or hereafter to be passed any application in lunacy is directed or authorised to be made by petition, or in any other specified manner, the lord chancellor may by rule direct in what manner the application is to be made.

(4) The lord chancellor and a secretary of state respectively may

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(*h*) Page 46.

by rules provide for preventing interference or delay in the exercise of the ordinary jurisdiction of the judges of county courts and magistrates respectively by the transfer of petitions and notices or otherwise as such rules may direct.

(5) Subject to any rules made under this section, the existing rules shall, so far as applicable, continue in force.

(6) All rules made under the provisions of this section shall be laid before parliament within three weeks after they are made if parliament is then sitting, and, if parliament is not then sitting, within three weeks after the beginning of the then next session of parliament, and shall be judicially noticed, and shall have effect as if enacted by this act.

(7) A rule under the provisions of this section shall not come into operation until the expiration of one month after the same has been made and issued.

Savings as to criminal lunatics, &c.

340.—(1) Save as in this act otherwise expressly provided, this act shall not extend to criminal lunatics.

(2) This act shall not affect the provisions of the Idiots Act, 1886.

49 & 50 Vict. c. 25.

341. In this act, if not inconsistent with the context—

Definitions.

"The bank" means the governor and company of the bank of England:

"Commissioners" means the commissioners in lunacy:

"Contingent right," as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands:

3 & 4 Will. 4, c. 74.

"Inquisition" includes an order, certificate, or verdict operating as an inquisition:

"Institution for lunatics" means an asylum, hospital, or licensed house:

"Land" includes an undivided share of land: (*i*)

"Lease" includes underlease:

"Lunatic" means an idiot or person of unsound mind: (*k*)

"Masters" means the masters in lunacy:

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth: (*l*)

"Next of kin" includes heir at law, and the persons entitled under the statutes for the distribution of the estates of intestates (*m*).

"Paymaster-general" includes the assistant paymaster-general for supreme court business:

(*i*) Page 284.
(*k*) Pages 12, 20, 284.
(*l*) Pages 283, 284.
(*m*) Page 87.

"Prescribed" means prescribed by this act or by any rules under this act:

"Private patient" means a patient who is not a pauper:

"Property" includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest, and any undivided share therein:

"Reception order" means an order or authority made or given before or after the commencement of this act for the reception of a lunatic, whether a pauper or not, in an institution for lunatics or as a single patient, and includes an urgency order:

"Relative" means a lineal ancestor or lineal descendant, or a lineal descendant of an ancestor not more remote than great grandfather or great grandmother:

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854: (*n*)

17 & 18 Vict. c. 104.

"Transfer" includes assignment, payment, and other disposition, and the execution, and performance, of every assurance and act to complete a transfer:

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage (*o*).

Repeal.

342. The acts mentioned in the fifth schedule are hereby repealed to the extent set forth in the third column of the same schedule.

Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured, by or under any enactment repealed by this act.

The Fifth Schedule.

Contains, among others, the following repeals:—

Session and Chapter.	Title or Short Title.	Extent of Repeal.
8 & 9 Vict. c. 100.	An Act for the regulation of the care and treatment of lunatics.	The whole Act.
13 & 14 Vict. c. 60.	The Trustee Act, 1850.	Sections three, four five six, and fifty-six.

(*n*) Pages 121, 284.

(*o*) Page 282. Only that part of s. 341 which contains definitions material to the subject matter of this treatise is set out here.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
13 & 14 Vict. c. 60.	The Trustee Act, 1850.	Sections twenty, twenty-six, twenty-seven, twenty-eight, thirty-one, forty, forty-one, forty-two, forty-four, forty-five, fifty-one, fifty-two, and fifty-three, so far as they relate to "The Lord Chancellor entrusted as aforesaid." Except so far as the above sections relate to Ireland.
15 & 16 Vict. c. 55.	An Act to extend the provisions of the Trustee Act, 1850.	Sections six and seven, so so far as relates to the Lord Chancellor entrusted as aforesaid, and sections ten and eleven. Except so far as the above sections relate to Ireland.
16 & 17 Vict. c. 70.	The Lunacy Regulation Act, 1853.	The whole Act.
18 Vict. c. 13.	An Act to amend and explain the Lunacy Regulation Act, 1853.	The whole Act.
23 & 24 Vict. c. 127	An Act to amend the law relating to attorneys, solicitors, proctors, and certificated conveyancers.	Section twenty-nine.
25 & 26 Vict. c. 86.	The Lunacy Regulation Act, 1862.	The whole Act.
25 & 26 Vict. c. 111	The Lunacy Acts Amendment Act, 1862.	The whole Act.
28 & 29 Vict. c. 80.	The Lunacy Act Amendment Act, 1865.	The whole Act.
30 & 31 Vict. c. 87.	The Court of Chancery (Officers) Act, 1867.	Section thirteen.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section seven. In section twenty-six, the words "(including the percentage on estates of lunatics)" and the words "(including the masters and other officers in lunacy)."

Session and Chapter.	Title or Short Title.	Extent of Repeal.
45 & 46 Vict. c. 82.	The Lunacy Regulation Amendment Act, 1882.	The whole Act.
48 & 49 Vict. c. 52.	The Lunacy Acts Amendment Act, 1885.	The whole Act.
52 & 53 Vict. c. 41.	The Lunacy Acts Amendment Act, 1889.	The whole Act.

THE LUNACY ACT, 1891 (54 & 55 Vict. c. 65).

Amendments in procedure upon inquisitions.

26.—(1.) The provisions of section ninety-four sub-section two of the principal Act as to the trial of issues in the High Court shall extend to all inquisitions, and the masters may, for the purpose of inquisitions held before them, exercise the powers by that sub-section conferred upon the judge who tries the issue.

(2.) The masters may make orders for the attendance of an alleged lunatic at such time and place as the order directs, for examination by the masters or a medical practitioner, and such order may be enforced in the same way as an order of a Judge of the High Court.

Procedure as to Chancery lunatics.

27.—(1.) Subject to rules in lunacy the jurisdiction of the judge in lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the judge in lunacy.

(2.) The power to make rules under section three hundred and thirty-eight, sub-section (2), of the principal act shall extend to all applications under the principal act and this act, and also to applications in the Chancery Division of the High Court in cases where such applications are also made under the principal act.

(3.) The power conferred by section one hundred and forty-eight of the principal act to make rules fixing per-centage and fees shall be deemed to extend to all proceedings under the principal act or this act, whether relating to lunatics so found by inquisition or to any other person in relation to whom or to whose property an order under the said acts has been or may be made. Provided that in the case of lunatics under the protection of the judge in lunacy by virtue of the transmission of the record of an inquisition from Ireland and its entry of record in the high court, and in the case of persons residing out of England and declared lunatic according to the laws of their place of residence, no per-centage shall be levied except upon income arising from property within the jurisdiction of the judge in lunacy and administered under his direction.

(4.) The provisions of section one hundred and sixteen, sub-section two, of the principal act shall apply to the persons named in sub-section one (*d.*) of the same section though not lunatics.

28.—In the principal act, the word "seised" shall include any vested estate for life or of a greater description, and shall extend to estates at law and in equity in possession or in futurity in any lands; and the word "possessed" shall include any vested estate less than a life estate at law or in equity in possession or in expectancy in any lands. Definition of seised and possessed.

29. The enactments in the schedule are hereby repealed. Repeal.

THE SCHEDULE

Contains, among others, the following repeals :—

Session and Chapter.	Short Title.	Extent of Repeal.
53 & 54 Vict. c. 5 .	The Lunacy Act, 1890.	Section ninety-nine, the words "with a jury." Section one hundred and forty-nine. Section three hundred and thirty-eight, sub-section two, the words "in lunacy."

PART II.

A TABLE

SHOWING THE RULES IN LUNACY, 1892, WHICH ARE SET OUT BELOW, CORRESPONDING TO THE RULES IN LUNACY, 1890, NOW REPEALED.

R. L. 1890.	R. L. 1892.	R. L. 1890.	R. L. 1892.
1	1	20	24
2	2	21	12
3	3	22	26
4	4	23	27
5	5	24	28
6	6	25	29
7	7	26	30
8	8	27	31
9	13	28	32
10	14	29	32
11	9	30	33
12	16	31	not re-enacted.
13	17	32	34
14	18	33	35
15	19	34	36
16	20	35	37
17	21	36	not re-enacted.
18	22	37	38
19	23	38	39

R. L. 1890.	R. L. 1892.
39	40
40	41
41	42
42	43
43	114
44	44
45	45
46	46
47	47
48	48
49	49
50	50
51	51
52	52
53	53
54	55
55	57
56	58
57	59
58	60
59	61
60	62
61	63
62	not re-enacted.
63	64
64	11
65	65
66	65
67	11
68	66
69	67
70	68
71	69
72	70
73	71
74	72
75	73
76	75
77	76
78	77
79	78
80	79
81	81
82	82
83	83
84	84
85	85
86	86
87	87
88	88
89	89
90	90
91	91
92	92
93	93
94	94
95	95
96	96
97	97

R. L. 1890.	R. L. 1892.
98	98
99	99
100	not re-enacted.
101	100
102	101
103	102
104	103
105	104
106	105
107	110, 111, 112
108	114
109	114
110	112
111	113
112	114
113	110
114	115
115	15
116	116
117	117
118	118
119	119
120	120
121	121
122	122
123	123
124	124
125	126, 127, 128
126	129
127	130
128	131
129	132
130	133
131	134
132	135
133	136
134	137
135	138
136	139
137	140
138	141
139	142
140	143
141	144
142	145
143	146
144	147
145	148
146	149
Form 1	Form 4
Form 2	Form 5
Form 3	Form 6
Form 4	Form 7
Form 5	not re-enacted
Form 6	Form 8
Form 7	Form 9
Form 8	not re-enacted.
Form 9	Form 12
Form 10	Form 13

THE RULES IN LUNACY, 1892.

THE CORRESPONDING NUMBERS OF THE RULES OF 1890 MAY BE ASCERTAINED BY REFERENCE TO THE FOREGOING TABLE.

Preliminary.

Short title.

1. These rules may be cited as the Rules in Lunacy, 1892.

Commencement of rules.

2. These rules shall come into operation on the 1st of March, 1892, and as from that date the Rules in Lunacy, 1890, and the Orders in Lunacy of the 5th March, 1891, and of August, 1891, shall be annulled.

Pending proceedings.

3. Pending proceedings shall be carried on according to the provisions of these rules, so far as possible, and subject thereto according to the practice heretofore subsisting, and in case of doubt as to the mode of procedure, in such of those modes as the masters direct. The provisions of these rules shall be subject to variation by special order in any case, and shall apply only where no express directions are given by any special order concerning any of the matters provided for in these rules, or so far as such directions do not extend. In all matters not provided for by these rules, the mode of procedure heretofore in force shall continue to be followed.

Month means calendar month.

4. Where in any order the time for doing any act or taking any proceeding is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these rules, such time shall be computed by calendar months unless otherwise expressed.

Exclusion of Sundays, &c.

5. Where any limited time, less than six days from or after any date or event, is appointed or allowed by these rules or any order for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

Time expiring on Sunday or close day.

6. Where the time for doing any act or taking any proceeding under these rules or any order expires on a Sunday or other day, on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

Number of days how computed.

7. In any case, in which any particular number of days, not expressed to be clear days, is prescribed by these rules or any order, the same shall be reckoned exclusively of the first day, and inclusively of the last day.

Power to enlarge or abridge time.

8. The judge in lunacy (in these rules called the judge) and the masters may enlarge or abridge the time appointed by these rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case requires, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

Forms.

9. The forms in the schedule may be used in the cases, in which they are applicable, with such variations as the circumstances require.

The Masters (a).

Masters to make orders.

10. The masters may make orders as regards administration and management, and they may direct by whom and in what manner the costs of any proceedings are to be paid.

Appeal from orders of masters. Forms 2, 3.

11. Any person affected by any order, decision, or certificate of a master may appeal therefrom to the judge without a fresh summons, upon giving notice of appeal within eight days from the date of the order, decision, or certificate complained of, or such further time as may be allowed by the judge or master. The notice of appeal shall be given to the persons, if any, interested in supporting the order, decision, or certificate, and a copy thereof shall, within the aforesaid period of eight days, be left at the masters' office, and the masters shall thereupon bring the matter before the judge.

Masters to communicate with and attend the judge.

12. The masters may communicate personally with the judge, with regard to any matter pending before them, when any point appearing to them to be novel or difficult arises, and they shall, when requested by the judge so to do, attend to give any information or assistance he may require.

Attendance in court.

13. Such one of the masters or their clerks as the masters, with the concurrence of the lord chancellor, direct shall attend in court upon the hearing of any application, and shall take a note of the order made by the court.

Masters to inquire into delay.

14. The masters shall inquire into the circumstances of any delay in the conduct of proceedings before them or in proceeding upon their orders, certificates, and directions, and for that purpose may call before them all parties concerned, and may certify accordingly where it seems to them expedient.

Masters may act jointly and severally.

15. Wherever the masters are referred to in these rules, they shall be deemed to be referred to jointly and severally, and everything to be done by or before the masters may be done by or before them or either of them, but all applications relating to the same person or his property shall, so far as convenient, be dealt with by the same master.

Mode of Application.

Application for order for inquisition. Form 4.

16. Applications for an order for inquisition, except in cases under section 100 of the Lunacy Act, 1890, shall be made by petition. The petition shall be signed by the petitioner and attested by a solicitor.

Application for traverse and supersedeas and for vesting orders.

17. Applications for a traverse and for a supersedeas, and applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders," shall also be made by petition.

18. Every petition for an order for inquisition, for a traverse, and for a supersedeas, and the evidence in support thereof shall be filed

Petitions for

(a) The jurisdiction of the masters is enlarged by these rules, they now having power to make orders in matters relating solely to administration and management. The statements in the text, pages 34 to 41, respecting the masters, therefore requires modification.

in the masters' office, and shall be brought before the judge without previous consideration by the masters.

inquisition, traverse, and supersedeas, to be brought before judge.

19. All other applications under the Lunacy Acts, 1890 and 1891, or under those acts and also in the Chancery Division, shall, unless the judge or masters shall in any particular case otherwise direct, be made by summons at chambers before the masters.

Other applications to be by summons.

20. In all cases, in which the judge has, under the Lands Clauses Acts, the Settled Estates Act, 1877, the Settled Land Acts, 1882 to 1890, or any other enactment, jurisdiction to make an order upon petition affecting the property of a lunatic, the application for the order shall, unless the judge or master in any particular case otherwise directs, be made by summons at chambers before the masters.

Applications under Lands Clauses Acts, Settled Estates Acts, Settled Land Acts, and other Acts.

21. If in any case, in which the application is not by these rules or by the judge or masters directed to be made by petition, a petition is presented without the direction of the judge or masters, no further costs shall be allowed, than would be allowed upon a summons.

Costs of petitions not to be allowed.

22. All applications, except those by these rules directed to be brought before the judge without previous consideration by the masters, shall be considered by the masters, and if the application does not relate to administration and management, the masters shall prepare the minutes of such order, if any, as they think should be made, and shall bring the application with the evidence and the minutes of the proposed order before the judge.

In matters not relating to administration and management masters to prepare minutes of order for the judge.

23. All matters, which require to be brought before the judge, shall be brought before him out of court. The judge may make an order upon any summons or petition without attendance of counsel, solicitors, or parties, or after such attendance, or may adjourn the summons or petition into court, or refer the same to the masters for inquiry, or further inquiry, upon any matter. Any matter may be adjourned from court for consideration by the judge out of court.

Matters to be brought before judge out of court.

24. The judge and masters respectively may direct any person to be served with notice of any application, and may dispense with service on any person.

Power to order or dispense with service.

25. Every application by summons to be brought before the judge shall be brought before him upon the original summons, and until the application is finally disposed of, it shall not be necessary to issue any further summons upon any appointment. Where an application by summons is directed to be served on any party, it shall not be necessary to issue a fresh summons, but the original summons may be served with such amendments (if any) as the circumstances require.

Only one summons to be issued on the same application.

The Inquisition.

26. The notice to an alleged lunatic of a petition for an order for inquisition shall be by service on him of a copy of the petition with a notice thereon endorsed signed by the petitioner or a solicitor. Such notice shall be in the Form 5 in the Schedule, or to that effect.

Notice of petition for inquisition. Form 5.

27. The notice to an alleged lunatic of a report of the commissioners under section 100 of the Lunacy Act, 1890, shall be in the Form 6 in the Schedule, or to that effect.

Notice of report of commissioners.

28. No order shall be made upon any such petition or report until after the expiration of seven clear days from service upon the alleged lunatic of notice of the petition or report.

Order not to be made until seven days after notice.

Service of notice.

29. Such notice shall be served on the alleged lunatic by being delivered to him personally, or where personal service cannot be effected or is inexpedient, then by being delivered to some adult inmate at the dwelling-house or usual or last known place of abode of the alleged lunatic within the jurisdiction, and an affidavit of service, stating particularly the time, place, and mode of service, and where there has not been personal service, the grounds of such service not having been made, shall be filed with the masters.

How demand of a jury to be made. Form 7.

30. An alleged lunatic may either by notice filed with the masters at any time before the consideration of the petition or report, or by himself, his counsel or solicitor upon such consideration, demand an inquisition before a jury. A notice demanding a jury shall be signed by the alleged lunatic and attested by a solicitor.

Proceedings after Inquisition.

Summons for inquiries after inquisition found.

31. Subject to the provisions of these rules as to inquiries respecting the next-of-kin and heir at law of a lunatic, the party having the conduct of the proceedings shall, immediately after inquisition found, take out a summons to inquire into the matters following :—

(a) The lunatic's age, position in life, and residence.
(b) The nature of his lunacy.
(c) Who are his next-of-kin and heir at law.
(d) Who ought to be appointed committee of his person and of his estate.
(e) Of what his property consists, and the particulars thereof.
(f) The amount of his income.
(g) In what manner, and at what expense, and by whom, and where, he has been maintained ; what should be allowed for his past maintenance, what, if anything, is due, and to whom, in respect thereof, and to whom and out of what fund the same ought to be paid.
(h) What should be allowed for future maintenance, when the allowance ought to commence, and out of what fund it should be paid.

Masters' order.

32. The masters may make such order on the summons in the last preceding rule mentioned as they think expedient.

Inquiries as to debts.

33. The masters may, when it seems to them expedient, inquire what undisputed debts (if any) are due from the lunatic, and to whom and whether the same or any of them ought to be paid, and out of what property, and they may make orders for the settlement or payment thereof and for the compromise of any disputed claim against the lunatic or his estate.

Inquiries as to dealings with lunatic's estate before inquisition.

34. The masters may make such inquiries as they think fit respecting any dealings with the lunatic's estate and the application of the same prior to the date of the inquisition, and respecting the state and condition of the lunatic at the time of such dealings, whether a summons for any such inquiry is pending before them or not.

Inquiries as to property of lunatic out of jurisdiction.

35. The masters may inquire whether any person resident out of the jurisdiction has by the law of the place where such person resides been found or declared a lunatic, and whether his estate or any part thereof has been vested in a curator or other person

appointed for the management thereof according to such law, and whether or not any property within the jurisdiction is vested in the lunatic, and what is his interest therein.

No inquiry as to next-of-kin and heir if fees not payable.

36. Where an order is made exempting the property of a lunatic from payment of fees, the masters shall not, during the continuance of the exemption, inquire respecting his next-of-kin and heir at law, unless they think it expedient.

Masters may defer and limit and dispense with inquiry as to next-of-kin and heir.

37. The masters may in any case defer an inquiry respecting next-of-kin and heir at law, or carry on the inquiry to such limited extent only and under such restrictions as they think expedient, and they may direct that persons claiming to be next-of-kin or heir at law be left to make out their claim at their own expense, and may in any case, if they think it expedient, wholly dispense with the inquiry.

Strict proof of pedigree may be dispensed with.

38. Where the masters are of opinion, that it is expedient that strict proof of pedigree should not be gone into, they may dispense with the same to such extent and in such manner as they think fit, and may require and receive such evidence as they think sufficient respecting the family and next-of-kin or heir at law.

Power to dispense with or disallow attendance of heir or next-of-kin.

39. The masters may dispense with and disallow the attendance on the proceedings of the heir at law or of all or any of the next-of-kin, either wholly or except at their own expense, or except upon special leave first obtained, and such notice only of attending the proceedings shall be given as the masters shall direct.

Masters to determine who is to attend the proceedings.

40. Subject to the provisions of these rules, the masters shall once in the matter of each lunatic so found by inquisition, and may as often as they think it expedient, determine which, if any, of the next-of-kin, and what other persons, if any, are to attend the proceedings or any particular proceeding, and only those persons (if any), to whom the masters have given leave to attend, shall be entitled to notice of or be allowed to attend on any proceeding at the cost of the estate, except by special leave first obtained.

Power to appoint guardian of infant.

41. Where an infant being one of the next-of-kin has no guardian, the masters may appoint a proper person to be his guardian for the purposes of the lunacy, and the person so appointed shall have the same powers, authorities, and discretion as a guardian ad litem appointed by the chancery division of the high court. The masters may revoke any such appointment and appoint another person to be guardian.

Power to consolidate matters and to use evidence in other matters.

42. The masters, if it seems to them expedient, may consolidate and carry on together similar proceedings before them in the matters of several persons being members of the same family, and may in any case use in the matter of one member of a family evidence filed in the matter of any other member of the same family.

Power to determine what solicitors are to represent the parties.

43. The masters may direct, that several parties, appearing before them by different solicitors, shall appear by the same solicitor, or that several parties, appearing before them by the same solicitor, shall appear by different solicitors. Where parties, directed to appear by the same solicitor cannot agree upon the solicitor to represent them, the master may nominate the solicitor; and if any of such parties insists upon appearing by a different solicitor he shall do so at his own cost.

Power to receive deeds and direct lodgment of securities.

44. The masters may receive any deed or security belonging to a lunatic, and may by order or certificate give liberty for payment or transfer into court of any money or stock belonging to a lunatic.

Liberty to deposit will of lunatic with masters.

45. Any person, in whose custody or control any testamentary paper of the lunatic is, shall be at liberty to deposit the same in the office of the masters upon oath, as they may direct, there to remain for safe custody.

On death of lunatic funds in court and effects deposited with masters to be paid and delivered.

46. On the death of a lunatic or a supersedeas being issued, the masters may make an order for payment, transfer, or delivery of any funds in court belonging to the lunatic or any documents or effects relating to or forming part of his estate, deposited in their office for safe custody, to the person entitled thereto.

On death of lunatic masters may open will.

47. The masters may, on being satisfied of a lunatic's death, open and read any document deposited with them purporting or alleged to contain any testamentary disposition made by him, for the purpose of ascertaining who is therein nominated executor thereof, and whether any direction is contained therein concerning his funeral or place of interment, and may deliver the document to the proper officer of the Probate Division to be dealt with according to law.

Applications as to Property of Persons of Unsound Mind not so found by Inquisition.

Notice of applications as to property of person of unsound mind not so found by inquisition. Form 8.

48. In the case of applications respecting the property of any person of unsound mind not so found by inquisition, seven clear days' notice of the application shall be given to such person by service on him of a copy of the summons with a notice indorsed thereon signed by the applicant or a solicitor. Such notice shall be in the Form 8 in the Schedule, or to that effect, and shall be served in the manner in which under these rules notice of a petition for an order for inquisition is to be served. The summons shall be returnable not less than seven clear days from its date (*b*).

Affidavit of service to be filed.

49. An affidavit of service stating particularly the time, place, and mode of service, and, where there has not been personal service, the grounds of such service not having been made, shall be filed with the masters.

Notice of objection. Form 9.

50. The person so served may file a notice of objection to the application.

Power to dispense with notice.

51. The masters may, if they think fit, dispense with notice to such person of any application after the first.

Masters may visit persons to whom any application relates.

52. For the purpose of any application before the masters relating to the property of a person not found lunatic by inquisition, the masters may, if they think fit, visit such person or require him to be produced before them as they direct.

Notice of application to next-of-kin or others.

53. The masters may, if they deem it expedient, direct that notice of the application be given to any of the next-of-kin of the person to whom the application relates, or to any other person, and only such persons as the masters direct to be served with notice shall be entitled to attend before them.

Temporary provision for maintenance.

54. In any case, where, pending the appointment of a person to exercise in relation to the property of a person of unsound mind not so found by inquisition any of the powers of a committee of the estate, it appears to the masters desirable, that temporary provision should be made for the expenses of the maintenance, or other

(*b*) *In re Somerville*, 31 Ch. D. 160.

necessary purposes or requirements of the lunatic, or any member of his family, out of any cash or available securities belonging to him in the hands of his bankers or of any other person, the masters shall be at liberty by certificate to authorise such banker or other person to pay to the person to be named in such certificate such sum as they certify to be proper, and may by such certificate give any directions as to the proper application thereof by that person, who shall be accountable for the same as the masters direct.

Provisions as to lunatics so found by inquisition to apply.

55. In all cases not otherwise herein specially provided for, the provisions of these rules relating to lunatics so found by inquisition and the other general provisions of these rules shall apply to applications relating to the property of persons of unsound mind not so found by inquisition, except that the certificate referred to in rule 32 shall not be made, and that the masters may make orders appointing persons to exercise, in relation to the property of persons of unsound mind not so found by inquisition, the powers of a committee of the estate.

Applications as to Persons mentioned in s. 116 (1) (*d*) *of the Lunacy Act,* 1890, *not being lunatic.*

Applications as to persons incapable through disease or age of managing their affairs. Forms 10, 11.

56. The provisions of these rules as to persons of unsound mind not so found by inquisition shall apply to applications respecting the property of any person who though not a lunatic is through mental infirmity arising from disease or age incapable of managing his affairs.

Vesting Orders.

Application for the appointment of new trustees or for vesting orders.

57. Applications under that portion of the Lunacy Act, 1890, which relates to "Vesting Orders" may be made—

(a) Where the application is for the appointment of new trustees, or relates to property subject to a trust, by any person beneficially interested in the property, whether under disability or not, or by any duly appointed trustee thereof.

(b) Where the application relates to any property subject to a mortgage, by any person beneficially interested in the equity of redemption or in the mortgage money whether under disability or not.

Title of application. Form 1 (f).

58. The application shall be intituled in the matter of the trust or mortgage, and of the particular lunacy, and in the matter of the Lunacy Act, 1890.

Persons to be served.

59. The applicant shall serve any such application upon the person or persons, who, according to the practice of the Chancery Division of the High Court, would be required or entitled to be served in similar cases.

Orders and Certificates.

Masters to have an official seal.

60. The masters shall be provided with an official stamp or seal for the authentication of orders, certificates, and other documents, and of amendments therein.

Orders to be entered by masters.

61. Orders made under the Lunacy Acts, 1890 and 1891, shall be drawn up by the masters and shall be entered by them in a proper book to be provided for that purpose.

Certificates of masters.

62. Every certificate shall, when the nature of the case so requires, state as concisely as possible the grounds of any recommendation and the circumstances relative thereto.

Certificates and orders to be prepared without attendances.

63. The masters shall, so far as possible, prepare their certificates and orders without attendance of solicitors or parties.

Settlement of certificates.

64. Every certificate, when prepared and settled, shall be signed by the masters at an adjournment to be made for that purpose, notice of which shall be given to the parties in cases where the certificate has been prepared without any attendance. If the parties consent to the signature of the certificate without any adjournment the masters may, if they think fit, sign the certificate as soon as it is prepared and settled.

Certificates to be binding unless altered on appeal.

65. Every certificate shall at the expiration of eight days after signature thereof by the master, subject in the case of an appeal to any variation directed to be made therein by the judge upon the hearing of the appeal, be binding on all the parties to the proceedings.

Numbers to be denoted by figures.

66. In orders, certificates, and other documents issued from or brought into the office of the masters, numbers shall be denoted by figures, and not by words.

Notice of dealings with funds in court.

67. The masters may, if they think fit, direct that any money, securities, or effects in Court shall not be paid or transferred out without notice to such person as occasion requires and they direct.

Clerical mistakes and accidental omissions.

68. Clerical mistakes in orders and certificates, or errors arising therein from any accidental slip or omission, may at any time be corrected by the judge, or by a master.

Committees of the Estate and Person.

Custody of estate or person may be continued to surviving or continuing committees.

69. Where it appears, that several persons ought to be appointed committees of the estate or person, and that it is expedient, that one or more of such persons should continue to act after the death or discharge of the others or other of them, the order appointing the committees may direct that the custody of the estate or person shall continue to the surviving or continuing committees or committee.

Masters to approve security.

70. The masters shall approve the security to be given by the committee of the estate. Such security may be reduced on request to an amount corresponding in the judgment of the masters with the condition of the property of the lunatic and the income thereof. The masters may also require the security of the committee of the estate to be increased, if in their judgment the circumstances of the case render it desirable.

Money or stock may be brought into court as security.

71. The masters may authorise the committee of the estate to give security in the whole or in part by bringing into court a sufficient sum of money or stock, and they may for that purpose by order give liberty for payment or transfer into court of any money or stock, and direct how the money is to be invested and the dividends applied, and the paymaster-general shall give effect to every such order.

Upon fresh security being given previous security discharged.

72. Where a committee enters into a fresh security, upon the same being duly perfected, and upon the balance then due by the committee being paid or secured to the satisfaction of the masters, the former security shall be discharged.

73. The committee of the estate shall annually, or at such longer or shorter periods as the masters fix, deliver his accounts or affidavit in lieu of accounts into the masters' office, and attend before the masters at or within such time as the masters fix, and have his accounts taken and passed, and the masters shall make to him all just allowances, including an allowance of his reasonable and proper costs, charges, and expenses of passing the account, and those of the next-of-kin, and other persons (if any) allowed to attend on the passing of the account, at the cost of the estate. Committee of estate to pass accounts.

74. The masters shall keep a book or books, in which shall be made, in respect of every committee, receiver, or other person liable to account, entries showing in a tabular form the following particulars, that is to say :— Masters to keep a register of committees and receivers.

(1.) The title of the matter.
(2.) The names of the committees, receivers, or other persons liable to account.
(3.) The date fixed for the delivery of accounts or of affidavits in lieu of accounts.
(4.) The date in each successive year when the accounts or affidavits are delivered into the masters' office.
(5.) The date in each successive year when the accounts are passed.
(6.) The balance or sum, if any, in each successive year directed to be paid into court by the committee, receiver, or other person liable to account.
(7.) The date fixed for the last-mentioned payment.
(8.) The date of the actual payment into court.
(9.) The dates of all orders made in the particular matter, and also such other particulars as the lord chancellor may from time to time by writing direct.

75. The committee of the estate shall, on each occasion of passing his account, and also whenever the masters so require, satisfy the masters that his sureties are living, and that neither of them has been adjudicated bankrupt or compounded with his creditors, and in default thereof the masters shall require him to enter into fresh security within such time as they fix. Committee to satisfy masters that sureties are living and solvent.

76. The balances certified by the masters to be due from the committee of the estate on passing his accounts, or so much thereof respectively as the masters certify to be proper to be paid by him, shall, unless the masters otherwise direct, be paid by him, at or within such time as the masters fix, into court, to the credit of the matter, and the same, when paid in, and any sum of cash in court to which the lunatic is entitled, or so much thereof respectively as the masters by their certificate direct, shall, unless the masters otherwise direct, within such time (if any) as the masters fix, be laid out in the purchase of such securities for the time being authorised for the investment of cash under the control of the high court, as the masters direct, and the dividends on the securities so purchased and all accumulations of dividends shall, unless the masters otherwise direct, when the same amount to a competent sum, be laid out in like manner without any request for the purpose. Balances of committee to be paid into court and invested.

77. The masters' allowance of the account of a committee shall be signified under the hand of a master and written under the account, and an order or certificate shall not be made unless it is required Mode of allowance of account.

with a view to the payment of money into court or for some other purpose.

If balances retained committee to be disallowed salary and to be charged with interest.

78. Where the committee of the estate makes default in bringing in his account, or in having the same passed, or in paying the balance certified to be due from him, or in causing the same or any sum of cash in court to be laid out, paid, or received, pursuant to any certificate or direction in that behalf, the masters shall, unless good cause be shown to them to the contrary, not only disallow his salary or remuneration (if any), but shall also charge him with interest at the rate of 4*l.* per cent. per annum upon any balance or cash for the time during which the same appears to have been improperly retained in hand or uninvested.

Masters to inquire in certain cases whether a new committee should be appointed.

79. The masters shall in each of the following cases, inquire whether or not it is expedient that a committee or a new committee of the person or of the estate should be appointed, that is to say :—

(a) On default of a person approved to be committee of the estate in duly perfecting his security or in duly perfecting a fresh security when required by the masters.

(b) On the death or discharge of a committee, or one of several committees, where the custody does not survive.

(c) If a receiving order in bankruptcy is made against a committee or he compounds with his creditors.

(d) If a committee absconds or goes to reside permanently abroad.

Appointment of new committee.

80. If it appears that a committee or a new committee ought to be appointed in any of the cases mentioned in the last preceding rule, the master may make an order appointing a proper person to be such committee or new committee accordingly.

Accounts to be passed on discharge or death of committee or after supersedeas.

81. Upon the discharge or death of the committee of the estate or upon the issue of a supersedeas or the death of the lunatic, the masters shall take and pass the account of the committee from his appointment or from the foot of his last account. If a balance is certified to be due from the committee or his estate, he or his legal personal representatives shall pay the same into court by virtue of the certificate or otherwise within such time as the masters direct, or in the case of a supersedeas shall pay the same to the person whose lunacy has been superseded, or in the case of the death of the lunatic shall pay the same to the legal personal representatives of the lunatic. If the masters find a balance due to the committee or his estate, the same shall be paid to him or his legal personal representatives by the new committee out of the lunatic's estate, or in the case of a supersedeas by the person whose lunacy has been superseded, or in the case of the death of the lunatic by his legal personal representatives. Upon payment of the balance, if any, or if no balance is found due or the taking of the account is not required and may in the opinion of the masters be properly dispensed with, the security of the committee shall be discharged.

Procedure where security of committee or receiver is to be discharged.

82. Where under these rules, or any special order, the security of a committee of the estate or receiver is to be discharged, then the masters shall deliver up the bond to be cancelled, or as the case may be, shall by certificate direct the clerk of the enrolment department of the central office to attend the Master of the Rolls with the enrolment of the recognisance to be vacated, and such clerk shall by virtue of such certificate attend accordingly ; and in the case of

security having been given in the whole or in part by a sum of money or stock being brought into court, the masters may make an order for the payment or transfer in such manner as the committee requests and as the masters think proper of the sum of money or stock, and the dividends thereon.

Receivers.

Appointment of receiver.

83. A receiver may be appointed in any case, in which such appointment shall be deemed expedient. Where a receiver is appointed, the person appointed shall, unless otherwise ordered, first give security to be allowed by the masters duly to account, for what he shall receive as such receiver, and to pay the same as the masters direct, and the person so appointed shall, unless otherwise ordered, be allowed by the masters a proper salary or allowance.

Provisions as to committees extended to receivers.

84. The provisions of these Rules respecting the committee of the estate, his accounts, payments, allowances, and matters of the like nature, shall extend, so far as applicable with the necessary modifications, to the case of a receiver.

Evidence.

Evidence may be taken orally or by affidavit.

85. The masters may direct the evidence in any matter or any particular proceedings to be taken orally or partly orally and partly by affidavit.

Masters may administer oaths and take recognisances.

86. The masters may administer oaths to any witness, whether his deposition or affidavit is to be used before themselves or not, and recognisances may be taken and acknowledged before them.

Masters may issue advertisements.

87. The masters may cause to be issued such advertisements, as seem to them expedient, with reference to any application before them.

Persons making affidavits may be cross-examined.

88. Every person, who has made an affidavit to be used on any proceeding, shall be liable to cross-examination by or before the masters, and after cross-examination may be re-examined.

Form of affidavits.

89. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

Affidavits by two or more deponents.

90. In every affidavit, made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that, if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

Description and abode of deponent to be stated.

91. Every affidavit shall state the description and true place of abode of the deponent.

Consent of new trustee to act.
Form 12

92. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by a solicitor.

Summonses (c).

Summonses, how prepared and issued. Form 13.

93. Summonses shall be prepared by the parties and sealed by one of the clerks in the masters' office with the seal of the office, and a copy of the summons shall be left at the masters' chambers by the party obtaining the same.

Service and return of summons.

94. Subject to the provisions of these rules, a summons before the masters shall be served at least two clear days before the return thereof, unless the masters direct the summons to be returnable within a shorter time after service. The summons shall be addressed to all the persons on whom it is to be served.

Further time for service may be allowed.

95. When from any cause a summons before the masters has not been served upon any party at least two clear days before the return thereof, or within such shorter time as the masters direct, an endorsement may be made upon the summons, and upon the copy thereof, stamped for service, appointing a new time for the parties not before served to attend, and such endorsements shall be sealed at the masters' chambers; and the service of the copy so endorsed and sealed shall have the same effect as the service of an original summons; and when any party has been served before such endorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.

Failure to attend on return of summons.

96. Where any of the parties summoned to attend the masters in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the masters may proceed ex parte if, considering the nature of the case, they think it expedient so to do.

Proceeding ex parte not to be re-opened except upon a special application.

97. Where the masters have proceeded ex parte, such proceeding shall not in any manner be re-considered in the masters' chambers, unless the masters, upon a special application made to them for that purpose by a party who was absent, are satisfied that a re-consideration is necessary or expedient.

Matters may be further considered from time to time.

98. Where matters in respect of which a summons has been issued are not disposed of upon the return of the summons, the parties shall attend from time to time, without further summons, at such time or times as may be appointed for the further consideration of the matter.

Masters may dispense with summons or require summons to be taken out.

99. The masters may, if they think fit, dispense with any summons ordinarily taken out in the course of the proceedings before them, and require any party attending before them to take out a summons for a particular purpose or within a particular time, and fix the time at which any particular summons shall be returnable before them, or at or within which any proceeding necessary or proper to be taken before them shall be taken, and may proceed de die in diem, or adjourn the proceedings before them, as they think fit.

(c) There seems no reason now why a summons should not be supported by a statement of facts in the same manner as originating summonses in the Chancery Division.

The Chancery Visitors.

Masters to supply chancery visitors with information.

100. The masters shall furnish the chancery visitors with information as to the custody of the person, the property, and the scheme for the maintenance of each lunatic to be visited by the chancery visitors, and as to any change which has taken place in the property or in the custody of the person or the scheme for maintenance.

Chancery visitors to inquire into maintenance of lunatic.

101. The chancery visitors shall on each occasion of visiting any lunatic inquire and examine whether he is maintained in a suitable and proper manner, having regard to the existing scheme for his maintenance, and also whether, having regard to his property, it appears expedient that any and what addition should be made to his comforts, or any and what alterations made in the scheme for or manner of his maintenance.

Chancery visitors to make special report in certain cases.

102. If the chancery visitors on such inquiry and examination consider that the lunatic is not maintained in a suitable manner, or that the allowance provided for his maintenance is not duly applied, or that any provision in the scheme for his maintenance, either for his personal comfort or enjoyment, or otherwise, is not duly observed, or that any addition to the comforts or any alteration in the manner of the maintenance of the lunatic should be made which his property is capable of providing, they shall forthwith make a special report, stating their opinion and the grounds thereof to the board of visitors.

Board to consider report.

103. The board shall thereupon consider the report, and shall, if they think fit, refer the same to the masters.

Masters to investigate matters in report.

104. The masters shall, on any such report as aforesaid being referred to them by the board, investigate the matters thereby reported upon, and may, if they deem it expedient, summon the committee of the person or estate to attend before them, to give explanations thereon, and such orders may be made as the circumstances require, and every such order shall be communicated by memorandum to the visitors.

Chancery visitors to report once a year to the Lord Chancellor.

105. The chancery visitors shall once at least in every year report to the lord chancellor in the case of each lunatic, stating the result of their examination and inquiry as to the maintenance of each lunatic, and shall also in any case in which any special report to the board has been made, state, so far as possible, what steps have been taken in consequence of such special report.

Master to inform committees of person of allowance for maintenance.

106. The masters shall inform the committees of the person upon their appointment of the annual amount allowed for the maintenance of the lunatic, or shall supply them with a copy of the scheme for maintenance, where a scheme has been provided.

Committee of person to report to visitors as to expenditure.

107. Each committee of the person of a lunatic shall annually or from time to time and as often as may be required of him render to the board of visitors an accurate statement in writing of the various sums expended by him, the better to enable the visitors to ascertain and report, whether the lunatic is being suitably maintained and whether any additional comforts can be provided for him. The visitors may dispense wholly or partially with the requirements of this rule if in any case they think it desirable so to do.

Committee of person to report to

108. Each committee of the person of a lunatic shall half-yearly make a report to the board of visitors as to the mental and bodily health of the lunatic. If there is a medical attendant of the lunatic

visitors as to health of lunatic.

such medical attendant shall either countersign the report of the committee, or shall make a separate report which shall accompany that of the committee or be forwarded direct to the board of visitors.

Power to visitors to summon committee of person.

109. The board may summon the committee of the person of the lunatic to attend before them and to give such information in his possession relating to the lunatic as they may require.

Costs and Taxation of Costs.

Rules of Supreme Court as to costs to apply.

110. The rules of the Supreme Court as to costs for the time being in force shall, subject to these rules, apply to the costs of proceedings under the Lunacy Acts, 1890 and 1891, taken after the commencement of these rules in any matter.

Pending proceedings.

111. In proceedings pending at the commencement of these rules, the rules as to costs in lunacy applicable before the commencement of these rules shall continue to apply.

Solicitors to be allowed same costs as in Chancery Division.

112. In all cases not otherwise herein specially provided for, solicitors shall be entitled to charge and be allowed the fees they would be entitled to charge and be allowed for work and labour of a similar character transacted in the Chancery Division of the High Court.

Refreshments not allowed.

113. No allowance shall be made for refreshments upon inquisitions.

Costs to be taxed by masters.

114. Costs of proceedings under the Lunacy Acts, 1890 and 1891, shall be taxed by and under the direction of the masters. Charges and expenses shall not be allowed, except to committees of the estate or person, unless under special circumstances the judge or masters in any case direct them to be allowed.

Procedure on taxation.

115. Where it is ordered that any costs, or costs, charges, and expenses, be taxed, the masters shall tax and certify such costs, or costs, charges, and expenses, and shall certify the names of the respective solicitors to whom the same should be paid; and due notice of attending the masters on the taxation shall be given to such parties as have liberty to attend on the proceedings in the matter; and where it is ordered that the costs, charges, and expenses of any committee or party in the matter of any application under the Lunacy Acts, 1890 and 1891, be taxed, the masters, in taxing such costs, charges, and expenses, shall not allow the costs, charges, or expenses of any application upon which no order has been drawn up, or of any evidence in relation thereto, unless they direct the same to be allowed as costs, in the matter, and shall not allow the costs, charges, or expenses of or incidental to any application before the masters which they have refused, unless the masters are of opinion that such application was proper.

Construction of and Proceedings under Orders.

Certain orders to take effect till further order.

116. All orders for the appointment of committees and for the allowance of maintenance shall be deemed to take effect only until further order.

Order appointing committee to take effect on security being given.

117. Where it is ordered, that a person named be appointed committee of the estate, the order shall be deemed to take effect only on the masters certifying, that he has given such security as they have approved for answering the estate and accounting for the rents, profits, and produce thereof once in every year, or oftener, if re-

quired, before the masters; and such security shall be perfected at or within such time as the masters appoint, and until such security has been perfected, the approved committee shall not, unless otherwise ordered, interfere in any manner in the affairs of the lunatic as the committee of his estate or otherwise. The masters shall inform the paymaster-general when such security has been perfected.

Committee to account for money received.

118. Where it is ordered, that the committee of the estate do receive, or be at liberty to receive, any money on account of the lunatic or his estate, he shall give credit for the same on passing his accounts before the masters, and where any sum is ordered to be allowed for the maintenance of the lunatic, or to be expended for any other purpose out of his estate, the committee of the estate shall be allowed the amount of the allowance for maintenance or the amount to be expended (as the case may be) on passing his accounts before the masters.

Payments by committee.

119. Where it is ordered, that the committee of the estate do pay any sums of money for maintenance, he shall pay the same out of income, and where it is ordered, that he do pay any costs, he shall, unless otherwise ordered, pay the same, when taxed, out of any moneys coming to his hands, after providing for the maintenance.

Inventory to be signed.

120. Where it is ordered, that any person be at liberty to retain any furniture or effects of the lunatic, he is to sign an inventory thereof and an undertaking to deliver up the same when required so to do, and such inventory and undertaking shall be deposited in the office of the masters.

Proper officers to transfer stock.

121. Where it is ordered, that a sum of stock standing in the books of the bank or other public company be transferred into court either generally or on a particular account, and no person is named in the order for making the transfer, the secretary or deputy secretary, accountant-general, or deputy accountant-general for the time being of the bank, or other proper officer of such other company, shall make the transfer, and he, or one of the cashiers for the time being of the bank, or other such proper officer as aforesaid, shall, if so directed, receive any sum of money standing in the books of the bank or such other company as aforesaid accrued due at the date of the order by way of dividend, bonus, or periodical payment in respect of the stock to be transferred, and also any future sum so to accrue due previously to the transfer, and shall pay the same into court either generally or on such particular account as aforesaid, as the case may require.

How lease to be settled.

122. Where an order is made authorising a lease of a lunatic's property, the masters shall settle a proper lease in pursuance of the order and shall sign their allowance of the lease when settled, and the committee of the estate shall in the name and on behalf of the lunatic execute the lease when allowed, upon the intending lessee executing a counterpart thereof.

Order to raise money by mortgage.

123. Where it is ordered, that the committee be at liberty to raise by mortgage of any part of the lunatic's estate a sum of money for any purpose, the masters shall settle and approve a proper mortgage, and the committee upon payment to him, or as may be directed, of the amount to be raised, shall in the name and on the behalf of the lunatic execute the mortgage when so settled and approved, and do all such other acts as are necessary to effectuate the same, and the committee shall, out of the income of the lunatic's estate, pay and keep down the interest on the mortgage.

Orders for sale.

124. Where an order for the sale of a lunatic's real or leasehold estate is made, the purchaser shall, within such time as the masters appoint, pay his purchase money into court, or otherwise as the masters direct, and in case of payment into court to such account, as the masters appoint, and upon such payment the purchaser shall be let into possession or receipt of the rents and profits as from such day as the masters appoint, and the committee of the estate shall forthwith in the name and on behalf of the lunatic execute all proper assurances of the property sold to the purchaser or as he directs to be settled by the masters, and due notice of attending the masters shall be given to all parties interested.

Writs of Execution, &c.

Writ of execution to issue out of central office.

125. All process or writs of execution, attachment or otherwise, requisite for the enforcement of any order made under the Lunacy Acts, 1890 and 1891, may be issued out of the central office of the supreme court.

Per-centage and Fees.

Per-centage in case of lunatics so found by inquisition.

126. There shall be paid a per-centage at the rate of 4 per cent. per annum on the clear annual income, amounting to 100*l.* and upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any case in any one year than 400*l.*

Per-centage in other cases.

127. In the case of lunatics not so found by inquisition and of persons mentioned in section 116 (1.) (*d.*) of the Lunacy Act, 1890, with respect to whose property orders have been made under which income is from time to time dealt with or made available, there shall be paid a per-centage at the rate of 2 per cent. per annum on the clear annual income amounting to 100*l.* and upwards so dealt with or made available, but so that no larger sum shall be payable in any case in any one year than 200*l.* This rule shall apply to all orders made after the commencement of these rules.

Sums under 10*s.* to be disregarded.

128. In calculating per-centage payable under these rules sums less than ten shillings shall be disregarded, and shall not be levied.

Fees.

129. The following fees shall be payable in respect of proceedings under the Lunacy Acts, 1890 and 1891 :—

Certificates.

	£	s.	d.
On every certificate of a master other than a certificate of a master respecting per-centage	1	0	0

Attendances.

	£	s.	d.
On an application, with or without subpœna, for any officer to attend as a witness or to produce documents (in addition to the reasonable expenses of the officer), for each day or part of a day he shall necessarily be absent from his office	1	0	0

The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably

become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

Orders.

	£	s.	d.
On every order	2	0	0
And in addition thereto the following fees, where the clear annual income of the person to whose property the order relates amounts to 100*l.* and upwards :			
(*a.*) On an order authorising a particular lease an amount equal to one-fourth the stamp duty payable on the lease ;			
(*b.*) On an order authorising a sum of money to be raised by mortgage or charge for every 100*l.* or fraction of 100*l.* of the amount to be raised.	0	2	0
(*c.*) On an order approving or authorising a contract for sale of any property for every 100*l.* or fraction of 100*l.* of the amount of the purchase money	0	2	0
(*d.*) On an order authorising a sale by auction where the reserve price is fixed or approved by the masters for every 100*l.* or fraction of 100*l.* of the amount of the reserve price	0	2	0
(*e.*) On an order conferring a general authority to sell or grant leases	10	0	0

Provided that the fees payable under the heads *a.*, *b.*, *c.*, and *d.*, shall not exceed 10*l.*

Provided also that the fees payable under the heads *a.*, *b.*, *c.*, *d.*, and *e.* shall not be payable upon any order made while per-centage is payable upon the income of the person to whose property the order relates.

Copies.

On all copies of documents, the actual cost.

Impressed stamps to be used.

130. The fees payable under these rules shall be paid by means of stamps. Impressed stamps shall be used, unless for some sufficient reason to be approved by the masters their use be inconvenient. The stamps shall be impressed or affixed on the vellum, parchment, or paper on which the proceeding in respect whereof such stamps are required is written or engrossed, or which may otherwise be used in reference to such proceeding.

Stamp to be cancelled.

131. Every officer, who receives any document, to which a stamp is affixed, shall immediately upon the receipt of such document cancel or deface the stamp thereon, by writing upon such stamp his name or the initial letters of his name in such a manner as to show clearly and distinctly, that such stamp has been made use of and so that the same may not be again used, and no document bearing an adhesive stamp shall be filed or delivered out until the stamp thereon has been cancelled or defaced in manner aforesaid.

Limited number of adhesive stamps to be used.

132. In all cases, where adhesive stamps are used, the stamps affixed to the document shall be of an amount corresponding as nearly as is practicable with the amount of the stamp, which such document requires, in order that no greater number of adhesive stamps may be affixed to any document, than is actually necessary.

Masters to certify amount of per-centage.

133. The masters shall certify the amount of per-centage payable in each case and the person who is to pay the same, and the time within which the same is to be paid, and such person shall pay the same out of the first money coming to his hands on account of income.

Masters may certify per-centage to be paid out of dividends.

134. The masters may, in such cases as they think fit, certify that the whole or any part of the per-centage payable on the incomes of lunatics shall be paid out of cash arising from dividends of the lunatic standing to the credit of the matter of any lunacy either generally or to any particular account, and when any such certificate is made, the amount certified thereby shall not be paid by means of stamps, but shall be carried over and transferred in manner hereinafter directed.

Lunacy Per-centage Account.

135. There shall be kept in the paymaster-general's office an account intituled "The Paymaster-General's Lunacy Per-centage Account."

Upon certificate of masters dividends to be carried to Per-centage Account.

136. When any such certificate as last herein-before mentioned is made, an office copy of such certificate shall be left at the office of the paymaster-general, who shall by virtue of such certificate, out of any cash arising from dividends or interest on money on deposit belonging to the lunatic standing to the credit of the matter of any lunacy, carry over the amount mentioned in such certificate from the credit of the account in such certificate mentioned to the credit of the lunacy per-centage account, and any orders made and to be made in any such matters respectively are to be subject to this rule and to be acted upon accordingly.

Transfer from Per-centage Account to Cash Account.

137. As soon as conveniently may be after the 31st of January in each year, the paymaster-general shall, by certificate under his hand, direct the bank to transfer to his "cash account" at the bank the amount of cash standing on that day to the credit of the lunacy per-centage account, and such certificate shall be a good and sufficient authority to the bank to write off the amount therein mentioned from the lunacy per-centage account, and to carry it to the "Cash Account," without any further order of the court, and upon receiving from the bank a certificate that such transfer has been effected, the amount so transferred shall be placed to the debit of the proper accounts in the books of the paymaster-general.

Per-centage to be paid by stamps.

138. Subject to the provisions herein-before contained, the per-centage shall be paid by means of stamps, and the masters shall give notice in writing to the committee of the estate or other proper person of the amount of per-centage to be paid by him according to the certificate of the masters, and of the time within which such amount is to be paid, and the committee or other person shall within such time pay the amount stated in the notice out of income by purchasing stamps to such amount and shall file such notice duly stamped at the office of the masters.

Per-centage may be paid for less than a year.

139. Where it appears to the masters with a view to the establishment of a uniform period for the payment of per-centage or for other purposes to be expedient, they may make in any case a certificate comprising the income of a period greater or less than

one year, and stating the amount of per-centage payable for such period.

140. The masters shall once at least in every six months and oftener if they think fit, certify to the treasury the names of all persons, if any, who are then in default in paying the amount certified to be payable by them in respect of the said per-centage and filing the notices duly stamped as herein-before provided, with the amounts payable by such parties respectively. Masters to certify persons in default in paying per-centage.

Copies of Documents.

141. The following copies of proceedings and documents shall be made in the masters' office (that is to say): office copies of affidavits to be made for and taken by the party filing the same; copies of documents prepared in the masters' office to be made for and taken by the party having the conduct of the proceedings; office copies of all orders, certificates, and other documents, and of all proceedings filed in the masters' office; and copies of all documents filed in the masters' office. Copies of all proceedings and documents, except those above mentioned, shall be made, delivered, charged, and paid for according to these rules. Copies to be made in the Masters' office.

142. The party, or his solicitor, requiring any copy, save as herein-before excepted, shall make a written request, to be delivered to the party by whom the copy is to be furnished or his solicitor with an undertaking to pay the proper charges. Upon the request being made, with such undertaking as aforesaid, copies of such proceedings or documents shall be made by the party or his solicitor filing or leaving the same, or who, under the last preceding rule, may have taken office copies thereof. Request for copies.

143. The copies shall be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the judge in any case directs, and shall be delivered accordingly upon demand and payment of the proper charges. Time for delivery of copies.

144. The charges for all such copies shall be at the rate of four-pence per folio of 72 words, every figure comprised in a column being counted as one word. Charge for copies.

145. The folios of all copies shall be numbered consecutively in the margin thereof, and the name and address of the party or solicitor by whom the same are made shall be endorsed thereon, and such party or solicitor shall be answerable for the same being true copies of the originals or of the office copies of the originals of which they respectively purport to be copies, as the case may be. Folios to be numbered.

146. Any party or solicitor, who has taken any office copy under these rules, shall produce the same in court or at the office of the masters, when required for the purpose of the proceedings, to which the same relates. Solicitor taking office copy to produce it.

147. All office copies and copies to be furnished by parties or their solicitors shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers, and in the case of copies to be furnished by parties or their solicitors, unless so written, the parties or solicitors furnishing them shall not be entitled to be paid for the same. Copies to be on convenient paper and legible.

Default of solicitor to furnish copy.

148. In case any solicitor, who is required to furnish any such copy as aforesaid, either refuses or for two clear days from the time, when the application for such copy has been made, neglects to furnish the same, the person by whom such application has been made shall be at liberty to procure a copy from the office, in which the original document is or has been filed or left in the same way, as if no such application had been made to the solicitor, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

Costs of unnecessary copies to be disallowed.

149. The masters shall not allow any costs in respect of any copy, unless the same appears to them to have been required and to have been made with due care.

The sixth day of February, 1892.

(Signed) HALSBURY, C.

THE SCHEDULE REFERRED TO IN THE FOREGOING RULES.

FORMS.

FORM 1.

Title of Proceedings.

(*a*). *Application as to alleged Lunatic.*

In Lunacy.
In the matter of A. B. a person alleged to be of unsound mind.

(*b.*) *Application as to Lunatic so found by Inquisition.*

In Lunacy.
In the matter of A. B. a person of unsound mind.

(*c.*) *Application as to Lunatic not so found by Inquisition.*

In Lunacy.
In the matter of A. B., a person of unsound mind not so found by inquisition.

(*d.*) *Application in Lunacy and in the Chancery Division.*

In Lunacy
and
In the High Court of Justice,
Chancery Division.
In the matter of A. B., a person of unsound mind [*or as the case may be*].

(*e.*) *Application as to Person through mental infirmity arising through Disease or Age incapable of managing his affairs.*

In the matter of A. B.,
and
In the matter of the Acts 53 Vict. c. 5, and 54 & 55 Vict. c. 65.

(*f.*) *Application for Vesting Order.*

In Lunacy.
In the matter of the trusts of an indenture dated the
and made between
and
In the matter of A. B., a person of unsound mind [*or as the case may be*].
and
In the matter of the Lunacy Acts, 1890 & 1891.

FORM 2.

Notice of Appeal from an Order of a Master.

[*Insert the Title of the Proceedings.*]

Take notice that of desires to appeal to the Judge from the order of the Master made in this matter dated the [*if part only is appealed from add:* so far as it directs that].

And that he intends to ask that the said order may be discharged [*or* varied] and that it may be ordered that

Dated the day of

(Signed)
To , Solicitors for
and to Messrs.
his Solicitors.

FORM 3.

Notice of Appeal from a Certificate of a Master.

[*Insert the Title of the Proceedings.*]

Take notice that of intends to appeal from the certificate of the Master made in this matter dated the

And that he intends to ask that the said certificate may be varied as follows : [*state the variation*].

And that such consequential directions may be given or corrections and alterations made in the said certificate as may be necessary.

Dated the day of .

(Signed)
To , Solicitors for
and to Messrs.
his Solicitors.

FORM 4.

Petition for an Order for Inquisition.

For title see Form 1A.

To the Right Honourable the Lord High Chancellor of Great Britain,

The humble petition of C. D., of in the county of showeth as follows:

1. A. B., now residing at is now and for years last past has been of unsound mind and incapable of managing himself and his affairs.

2. Your petitioner is the father of the said A. B.

Your petitioner therefore humbly prays that the Masters in Lunacy, or one of them, may be directed to inquire concerning the alleged lunacy of the said A. B.

And your petitioner will ever pray, &c.

(Signed) C. D.

Witness to the signature of the said C. D.
E. F.
Solicitor.

FORM 5.

Notice to alleged Lunatic of Petition for Inquisition.

"Mr. A. B.

"Take notice that a petition, of which a copy is within written, has been presented to the Lord Chancellor by me (*or* by C. D., of),* and that by virtue of and under the same an inquiry may be ordered to take place before one of the Masters in Lunacy as to whether you are or are not of unsound mind and incapable of managing yourself and your affairs, but that you may, in case you think fit, demand that such inquiry may, if ordered, be had before a jury, in which case a notice of such your desire must be signed by you and attested by a solicitor, and filed at the office of the Masters in Lunacy, the Royal Courts of Justice, London, within seven clear days after your receipt of this notice.

"Dated the day of .

(Signed) C. D.
(or X. Y. of
Solicitor.)"

FORM 6.

Notice to alleged Lunatic of Report of Commissioners under the Lunacy Act, 1890.

"Mr. A. B.

"Take notice that the Commissioners in Lunacy, on the day of made a Report to the Lord Chancellor, stating that

* When a demand for a jury has already been filed, from this to the end is to be omitted.

you are detained or taken charge of as a lunatic, and that they are of opinion that your property is not duly protected (*or* that the income of your property is not duly applied for your benefit *or to that effect*): And take notice that such Report having been duly filed, an inquiry may thereon be ordered by the Judge in Lunacy to take place before one of the Masters in Lunacy as to whether or not you are of unsound mind and incapable of managing yourself and your affairs, but that in case you think fit to demand that such inquiry if ordered to be held may take place before a jury, a notice thereof must be signed by you and attested by a solicitor, and filed at the office of the Masters in Lunacy, the Royal Courts of Justice, London, within seven days after your receipt of this notice.

"Dated the day of .

(Signed) "X. Y."

FORM 7.

Notice by alleged Lunatic demanding a Jury.

"In the matter of A. B. an alleged lunatic.

"I, the above-named A. B., having been on the day of served with a notice of a petition for an order for an inquiry (*or* of the filing of a Report whereon an inquiry may be ordered), whether or not I am of unsound mind and incapable of managing myself and my affairs, do hereby demand that, in the event of such an inquiry as aforesaid being ordered, the same be had before a jury.

"Dated the day of .

(Signed) "A. B."

"Witness,
"M. N., of
"Solicitor."

FORM 8.

Notice to Person of Unsound Mind not so found by Inquisition of Application under the Lunacy Acts, 1890 *and* 1891.

"Mr. A. B.

"Take notice that a summons, of which a copy is within written, was on the day of issued by me (*or* by C. D., of), and that in pursuance thereof orders may be made on the ground (*state the ground on which the case is brought within section* 116 *of the Lunacy Act*, 1890, *e.g.*, that you are lawfully detained as a lunatic) for the purpose (*state the purpose, e.g.*, of rendering your property or the income thereof available for the maintenance or benefit of yourself *or* of yourself and your family *or* for carrying on your trade or business), and that if you intend to object to such orders being made, notice of such objection must be signed by you and attested by a solicitor, and filed at the office of the Masters in Lunacy, the Royal Courts of Justice, London, within seven clear days after your receipt of this notice.

"Dated the day of .

(Signed) C. D.
(or) X. Y.
Solicitor."

FORM 9.

Notice of Objection by Person of Unsound Mind not so found by Inquisition to Order under Lunacy Acts, 1890 *and* 1891.

I, A. B., of , having been served with a notice of a summons for an order respecting my property, under the Lunacy Act, 1890, hereby give notice of my intention to object to such order being made.

Dated the day of

A. B.

Witness,
E. F.,
Solicitor.

FORM 10.

Notice to Person through Mental Infirmity arising from Disease or Age incapable of managing his Affairs.

"Mr. A. B.

"Take notice that a summons, of which a copy is within written, was on the day of issued by me (*or* by C. D. of), and that in pursuance thereof, orders may be made on the ground that you are, through mental infirmity arising from disease [*or* age], incapable of managing your affairs, for the purpose [*state the purpose, e.g.*, of rendering your property or the income thereof available for the maintenance or benefit of yourself *or* of yourself and your family *or* for carrying on your trade or business], and that if you intend to object to such orders being made notice of such objection must be signed by you and attested by a solicitor, and filed at Room No. at the Royal Courts of Justice, London, within seven clear days after your receipt of this notice.

Dated the day of

(Signed) C. D.
(or) X. Y.
Solicitor."

FORM 11.

Notice of Objection by Person through Mental Infirmity arising from Disease or Age incapable of managing his Affairs.

I, A. B., of , having been served with a notice of a summons for an order respecting my property under the Acts 53 Vict. c. 5, and 54 & 55 Vict. c. 65, hereby gives notice of my intention to object to such order being made.

Dated the day

A. B.

Witness,
M. N.,
Solicitor.

FORM 12.

Consent to Act.

I, A. B., of , hereby consent to act as a trustee of the [*describe the instrument*].

Dated the day of .

(Signed) A. B.

I, C. D., of , solicitor, hereby certify that the above written signature is the signature of A. B., the person mentioned in the above-written consent.

Dated the day of .

(Signed) C. D.

FORM 13.

Summons before the Masters.

For title, see Form 1.

Let all parties concerned attend the Master in Lunacy in Chambers [*or in the case of a person through mental infirmity arising from disease or age incapable of managing his affairs:* the Master in Chambers at Room No.], at the Royal Courts of Justice, London, on day the day of at o'clock in the noon on the hearing of an application on the part of [*here state on whose behalf the application is made and its object*].

Dated the day of 18 .

This summons was taken out by ,

of , solicitor for .

To

PART III.

FORMS (*a*).

BOOK I., PART I.

CHAPTER I.

Titles for Petitions, Summonses, States of Fact, Affidavits, Reports, Orders, &c.

1. *Before Inquisition found.*

In Lunacy,
In the matter of A. B., a supposed lunatic.

2. *After Inquisition found and during the Lunacy.*

In Lunacy,
In the matter of A. B., a person of unsound mind
Or,
In the matter of A. B., a lunatic.

3. *Pending a Traverse.*

In Lunacy,
In the matter of A. B., a person found to be of unsound mind.

4. *Pending or in Relation to a Supersedeas.*

In Lunacy.
In the matter of A. B., late a lunatic.
Or
In the matter of A. B., late a person of unsound mind.

(*a*) The general forms of proceedings are kept in print by Messrs. Fry of Gray's Inn.

5. *After the Death of the Lunatic.*

In Lunacy.
In the matter of A. B., a person of unsound mind, now deceased.
Or,
In the matter of A. B., a lunatic, deceased.

6. *General Form of Petition.*

In Lunacy.
In the matter of, &c.
To the Right Honorable the Lord High Chancellor of Great Britain.
The humble petition of A. B., of [*address and description*],
Sheweth,
That, &c.
Your petitioner therefore humbly prayeth that, &c.
And your petitioner shall ever pray, &c.
A. B.
Witness to the signing of the said A. B.,
C. D. of [*address and description*].

7. *General Form of State of Facts and Proposal.*

In Lunacy.
In the matter of, &c.
The state of facts and proposal of C. D., of [*address and description; adding:*—"The petitioner for the order for inquiry in this matter dated the day of 18 ," *or* "the committee of the estate," *or* "the committee of the person of the said A. B." *according to the circumstances*]
States:—
That, &c.
The said C. D. therefore submits that, &c.
And the said C. D. craves leave, &c.
See now R. L. 1890, 100, ante, p. 471.

8. *General Form of Affidavit.*

In Lunacy.
In the matter of, &c.
I, A. B., of [*address and description*], make oath and say as follows (that is to say):—
1. That, &c.
Sworn, &c.

9. *Short Form of Affidavit, verifying Petition, State of Facts, Proposal or other Document, and to be annexed thereto.*

In Lunacy.
In the matter of, &c.
I, A. B., the petitioner or applicant named in the above-written [*or* annexed] petition, make oath and say as follows :—
That so much of the above-written petition as relates to my own acts and deeds is true, and so much thereof as relates to the acts and deeds of any and every other person I believe to be true.
Sworn, &c.

10. *Summons of Person objecting to Master's Certificate.*

See R. L. 1890, Sch. Form 8, ante, p. 482.

CHAPTER II.

12. *General Commission to the Masters.*

Elmer, p. 144.

CHAPTER III.

13. *Petition for Inquiry.*

In Lunacy.
In the matter of A. C. M., widow, a supposed lunatic.
To the Right Honorable the Lord High Chancellor of Great Britain.
The humble petition of E. B. L., of, &c.
Sheweth,
That A. C. M., now residing at, &c., is now and has for the space of a month last past been of unsound mind and altogether unfit and unable to govern herself or to manage her affairs, as by the accompanying affidavits appears.
That your petitioner is a brother of the said A. C. M.
Your petitioner therefore prays your lordship that the masters in lunacy, or one of them, may be directed to inquire and certify concerning the lunacy of the said A. C. M.
And your petitioner will ever pray, &c., &c., &c.
E. B. L.
Witness to the signing by the said E. B. L.
W. H. N.,
Solicitor.

14. *Another Form of Petition for Inquiry.*

In the matter of J. T., a supposed lunatic.
To the Right Honorable the Lord High Chancellor of Great Britain.
The humble petition of W. P., of, &c.

Sheweth,

That J. T., now residing at , is now and for the space of three months last past hath been of unsound mind and altogether unfit and unable to govern himself or to manage his affairs, as by the affidavits hereto annexed appears.

That the said J. T. is about seventy-six years old, is a widower, and has been twice married. There was no child by either marriage.

That your petitioner is the nephew of C. T., the late second wife of the said J. T., and with his two sisters resided with the said C. T. (then C. P.) previous to and at the time of her marriage with the said J. T. On such marriage your petitioner and his sisters went to live with the said J. T., and your petitioner for many years resided with the said J. T. until your petitioner went out in the world, and your petitioner's sisters continued to reside with the said J. T. until they were respectively married.

Your petitioner believes that the said J. T. has made a will, by which your petitioner is appointed sole executor thereof.

Your petitioner believes that the most nearly related next of kin to the said J. T. are M. D., wife of H. D., of, &c., a first cousin of the said J. T.; the rev. M. W. T., of, &c., a first cousin once removed of the said J. T., and the brothers of the said M. W. T.; and F. R., of, &c., also a first cousin once removed of the said J. T.

That the brothers of the said M. W. T. have never known the said J. T., and that the said M. D., M. W. T., and F. R. have not for many years until quite recently seen or corresponded with the said J. T., and none of them make any objection to this petition being presented to your lordship by your petitioner, as by the paper writings and affidavits hereto annexed appears.

Your petitioner therefore humbly prays your lordship that the masters in lunacy, or one of them, may be directed to inquire and certify concerning the lunacy of the said J. T.

And your petitioner shall ever pray, &c.

Witness to the signature of the said W. P. W. P.

J. C. B.
Solicitor.

15. *Affidavit (short) of the Petitioner in support of Petition for Inquiry.*

In Lunacy.
In the matter of J. T., a supposed lunatic.

I, W. P., of, &c., make oath and say as follows:—

That the statements in the foregoing petition are true to the best of my knowledge and belief.

Sworn, &c.

16. *Affidavit of Medical Man in support of Petition for Inquiry.*

In Lunacy.

In the matter of J. T., of, &c., a supposed lunatic.

I, E. S. H., of, &c., make oath and say,

1. That for the last twenty years I have known and been professionally concerned as the medical attendant upon the said J. T., and that I have frequently, and of late daily, visited the said J. T., and have examined him as to the state of his mind, and that in my judgment and belief he is now, and has been for some time past, in a state of unsoundness of mind and totally incapable of managing himself or his affairs.

2. The unsoundness of mind of the said J. T. is rendered manifest from his numerous delusions and irrational conduct and conversation, and from a supposition on his part that he is not in his own house, as he in fact is, but that he is confined in a lunatic asylum.

Sworn, &c.

17. *Affidavit of the Petitioner as to the Kindred of the supposed Lunatic, and the Fact and Character of his Insanity.*

In Lunacy.

In the matter of J. T., of, &c., a supposed lunatic.

I, H. P., of, &c., make oath and say as follows :—

1. That I have known the said J. T. for upwards of twenty years ; I married S. S., a niece of the first wife of the said J. T. ; the said S. S. had for many years lived with the said J. T., and I married her from his house. My said wife has been continually intimate with the said J. T. since her marriage.

2. I never heard of any relatives of the said J. T. with whom he was in any way intimate, except M. W. T., of, &c., F. R., of, &c., and M. D., the wife of S. H. D., of, &c., with all of whom the said J. T. is but very slightly acquainted.

3. On the 1st day of February instant I visited the said J. T. for the purpose of ascertaining the state of his mind.

4. From my examination of the said J. T., I am decidedly of opinion that he is of unsound mind, and wholly incapable of the management of himself or his affairs, or of the care of his property.

5. The unsoundness of the mind of the said J. T. is rendered manifest by a supposition on his part that persons are constantly present in the room or garden who are not there ; that people seek to get in at the windows ; that he is constantly watched and annoyed by persons who seek to look into his bed-room, which is on the first floor and is not overlooked ; and also by constant failure of memory and inability to connect his ideas together.

Sworn, &c.

18. *Affidavit of a Relation as to the Insanity, Family History and Property of the supposed Lunatic.*

In Lunacy.

In the matter of A. C. M., widow, a supposed lunatic.

I, E. B. L., of, &c., make oath and say as follows :—

1. That the said A. C. M. is my sister, and is the widow of E. C. M., formerly of, &c., who died in the month of August, 1874, and she is of the age of thirty-seven years, and that I, the said A. C. M., J. F. L., of, &c., and M. J., the wife of the Rev. R. G., vicar of, &c., are the only children of A. L., formerly of, &c., who died in the month of May, 1859, and that the mother of the said A. C. M. died in the month of December, 1872.

2. That the said A. C. M. has for many years past, at various times, exhibited symptoms of unsoundness of mind, that she was married to the said E. C. M. in the year 1864, and in the following year obtained a decree of judicial separation from him on her own petition, and since that time she has usually resided under the care of a medical man ; that in or about the year 1869 she was placed under medical certificates, with Mr. B. C., a physician of, &c., and on the 26th day of March, 1870, the commissioners in lunacy discharged her from legal control, but she continued until late in the year 1873 to reside with the said B. C. ; that she afterwards resided for a considerable period, and until the month of November last, with Dr. Saunders, of, &c., that she has since resided at various places, and on or about the 29th day of January last went to reside at Brighton, and while at that place she became subject to delusions and so incoherent and violent in her manner that on the 12th day of April last she was, under the certificate of two medical men, removed by my direction to , where she now is.

3. That I am one of the trustees under the indenture of settlement of the property of the said A. C. M., and I say that the property of the said A. C. M. consists of the following particulars, that is to say :—

[*Here follows a statement of the property.*]

Sworn, &c.

19. *Affidavit as to Kindred, the Petition being presented by a Stranger, named Executor in a Will of the supposed Lunatic.*

In Lunacy.

In the matter of J. T., a supposed lunatic.

I, J. B., of, &c., make oath and say as follows :—

1. I have known and been well acquainted with the said J. T. for twenty years and upwards, and have for many years been employed by the said J. T. as his solicitor.

2. On the first day of January, 1870, I prepared for the said J. T. his will, which he executed in my presence on that day. By that will he appointed W. P. (therein described as his nephew, but who was, I believe, the nephew of the late second wife of the said J. T.), of, &c., the sole executor of his said will, and I believe the said J. T. has not revoked such will or executed any codicil thereto.

3. In consequence of the inability of the said J. T. to manage his affairs, a petition is about to be presented to the lord-chancellor, praying for an inquiry as to the lunacy of the said J. T., by the said W. P., and I believe that he is the most proper person to present such petition.

4. I have made inquiries as to the next of kin of the said J. T., and I believe that M., the wife of H. D., of, &c., first cousin, who, I am informed, is old and infirm, and F. R., of, &c., and the Rev. M. W. P., of, &c., both first cousins once removed, are the only next of kin of the said J. T. of whom he has for many years past had any knowledge, and that his acquaintance with them has been very slight; indeed, I never heard the said J. T. speak of these or of any other relations.

Sworn, &c.

20. *Notice of Petition to be served on the Lunatic where within the Jurisdiction.*

See Form 2 to Sch. to R. L. 1890, ante, p. 479.

21. *Notice to the alleged Lunatic of a Report of the Commissioners under Lunacy Act.*

Sch. to R. L. 1890, Form 3, ante, p. 480.

22. *Notice by alleged Lunatic demanding a Jury*

Sch. to R. L. 1890, Form 4, ante, p. 480.

23. *Caveat against Order for Inquiry.*

Elmer, p. 143.

24. *Affidavit of Service of the Petition on the supposed Lunatic.*

In Lunacy.

In the matter of J. T., of, &c., a supposed lunatic.

I, J. C. B., of the firm of B. & Co., of, &c., make oath as follows:—

1. That I did on the day of , personally serve the above-mentioned J. T. with the petition in this matter, presented on the day of , to the lord high chancellor by W. P., of, &c., by delivering to and leaving with the said J. T., at, &c., a true copy of such petition.

2. And I say that on the copy of the said petition so served as aforesaid, was indorsed a notice in the words following, that is to say,—"Mr. J. T., of, &c., Take notice, that a petition of which a copy is within written, was on the day of presented to the lord chancellor by W. P., of, &c., and that by virtue of and under the

same an inquiry may be ordered to take place before one of the masters in lunacy, as to whether you are or are not of unsound mind and incapable of managing yourself and your affairs, but that you may, in case you may think fit, demand that such inquiry may, if ordered, be had before a jury, in which case a notice of such your desire must be signed by you and attested by your solicitor, and filed at the office of the masters in lunacy, the Royal Courts of Justice, London, within seven days after your receipt of this present notice, Dated this day of February, J. C. B. for partner and self, of, &c. solicitors for the petitioner, and that such notice was signed by me for partner and self, of, &c.

Solicitors for the said petitioner.
Sworn, &c.

25. *Affidavit as to Notice of the Petition to the Next of Kin where Petition presented by a Stranger.*

In Lunacy.
In the matter of J. T., a supposed lunatic.

I, J. C. B., of, &c., make oath and say :—

1. From inquiries I have made, I believe M. D., the wife of H. D., of, &c., a first cousin of the above-named J. T. ; M. W. T., of, &c., a first cousin one removed of the said J. T. ; and F. R., of, &c., also a first cousin once removed of the said J. T., to be the only next of kin of the said J. T. with whom he had during the last fifteen years any acquaintance, and that he has no nearer relations.

2. I have had several interviews with the said M. W. T. relative to the state and affairs of the said J. T., and I have explained to the said M. W. T. that one W. P. proposed to present a petition for an inquiry as to the lunacy of the said J. T., for the better protection of his person and property. The said M. W. T. expressed his willingness to make an affidavit in support of and expressing his consent to the said petition being presented by the said W. P., but afterwards informed me he had determined not to have anything whatever to do with the affairs of the said J. T., either by interference or opposition; and he stated that in his opinion the petition ought to be presented at once, and from my information to him he considered that the said W. P. was the most proper person to present such petition ; and subsequently the said M. W. T. at my request wrote to my said firm a letter, of which the following is a copy :—

January 30th, 1871.

Dear Sir,—I, M. W. T., of, &c., say that I am a cousin once removed of J. T. of, &c., and that I have never been intimate with the said J. T., having in fact only seen him upon two occasions during the last twenty years. I have seen Mr. J. T., and I certainly believe him to be unable to manage his own business, but I decline interfering in any way in his affair. I am, dear Sir,

Yours truly,
M. W. T.

And the said M. W. T. signed the said letter in my presence.

3. On the 27th day of January, 1871, I wrote in the name of my firm to the said Mrs. M. D., requesting that she would state if she consented to the said proposed petition being presented by the said

W. P., and in reply thereto my firm received from the said M. D. a letter, of which the following is a copy :—

St. John's House, January 28th, 1871.

Sirs,—I have just received your letter respecting Mr. T., and beg to express our sincere regret as to his state of health. When I saw him last he seemed so well both in body and mind that I trust it may still be unnecessary to proceed to the extremity you propose. At any rate, I must decline all interference, as neither my husband nor myself know anything of the parties to whom you allude. I remain, Sir,

Yours, &c. &c.,

Messrs. B. & Co., of, &c. M. D.

4. That I have also been in correspondence with the said E. R., with a view to obtain an affidavit in support of the petition from him. On an affidavit for this purpose being sent to him, he declined to swear the same, but has since written to my said firm a letter, of which the following is a copy :—

February 8th, 1871.

Gentlemen,—In compliance with your letter of the 6th instant, I now beg to state that I am first cousin once removed to J. T., of, &c., against whom you inform me a petition to inquire into his lunacy is about to be presented by Mr. W. P. I was intimate with Mr. T. some sixteen years ago, and again renewed my acquaintance with him in 1865, but since then I have not seen him. I think Mrs. D., of, &c., is his nearest relative, and that I am, after Mrs. D., as nearly related as anyone else to him. I do not wish to interfere in the proceedings concerning his lunacy. I am, Gentlemen,

Your obedient servant,

Messrs. B. & Co. E. R.

Sworn, &c.

26. *Petition for Liberty to attend Inquiry.*

Elmer, p. 143.

27. *Common Order for Inquiry.*

Elmer, p. 136.

28. *Order where two Petitions, determining the Conduct of Petition and giving Liberty to attend the Inquiry, the Inquiry to extend to the Question from what Time the Lunacy (if any) existed.*

Re Wood, 5 December, 1859 ; 1 De G., F. & J. 144 ; *Re Welb*, 22 July, 1846 ; 2 Coop. T. L. C. 155.

29. *Common Order giving Liberty to attend Inquiry.*

Elmer, p. 144.

30. *Order for Access by Medical Men to the alleged Lunatic, to enable them to give Evidence as to the State of his Mind.*

2 Coop. T. L. C. 148, n. (*a*).

31. *Order directing the Issue of a Commission Abroad.*

Re Webb, 22 July, 1846 ; 2 Coop. T. L. C. 155.

32. *Commission to examine Witnesses Abroad, and Documents relating thereto.*

Re Webb, 22 July, 1846 ; 2 Coop. T. L. C. 158 *et seq.*

CHAPTER IV.

33. *Precept for Inquiry where the Inquiry is without a Jury*

Elmer, p. 145.

34. *Precept for Inquiry where the Inquiry is with a Jury*

Elmer, p. 145.

35. *Summons to Witness.*

Elmer, p. 146.

36. *Warrant to produce alleged Lunatic.*

Elmer, p. 146.

37. *Form of Inquisition.*

Elmer, pp. 148, 149.

38. *Order to bring a Lunatic, who is out of the Jurisdiction, back to England.*

Re Wykeham, 5 August, 1823 ; T. & R. 538.

39. *Order for Advance of Money to Lunatic for the Purpose of opposing an Inquiry.*

Re Naylor, 12 December, 1862 ; 1 N. R. 173.

CHAPTER V.

40. *Petition for Leave to Traverse.*

Elmer, p. 238.

41. *Affidavits in Support.*

Elmer, pp. 239, 240.

42. *Form of Traverse.*

Elmer, p. 241.

43. *Order for Advance of Money to Lunatic for Purpose of Traversing.*

Ex parte Turner, 27 June, 1826.

44. *Order giving Liberty to Traverse, but providing for Postponement of Traverse if thought proper.*

Re Bridge, 11 August, 1841 ; Cr. & P. 350.

CHAPTERS VI., VII., VIII.

45. *First Evidence on Application as to Committees, Payment of Debts and Expenses of the Inquisition and Allowance for Maintenance.*

In Lunacy.

In the matter of A. M., widow, a person of unsound mind.

The affidavit of E. P. L., of, &c., the petitioner for the order for the inquiry in this matter, dated the day of 18 , under the rules in lunacy,

States:

1. *Inquisition.*

That, &c.

2. *Heir-at-Law and Next of Kin.*

That, &c.

3. *Condition and Residence of the Lunatic.*

That, &c.

4. *Nature of the Lunacy.*

That, &c.

5. *Property and Income.*

That, &c.

6. *Maintenance.*

That, &c.

7. *Debts*

That, &c.

8. *Committees of Person*

That, &c.

9. *Committees of Estate.*

That, &c.

The said E. P. L. therefore proposes that he the said E. P. L., E. L. his wife, and A. F. L., should be appointed joint committees of the person of the said A. M., that the said H. W. T. should be appointed committee of the estate of the said A. M., and that a sum sufficient to pay the debts of the said A. M. and the expenses of and relating and incidental to these proceedings should be paid out of the accumulations, &c., and that the sum of a year should be allowed for the future maintenance of the said A. M., and that the said sum of ought to be applied according to the following scheme, that is to say :—

[*Here follows the scheme.*]

46. *For the Affidavits as to the Family, Circumstances, &c., of the Lunatic in Support of Summonses.*

Cf. Forms 17, 18, 19, supra; observing, however, that the affidavits will now be entitled "In the matter of A. B., a lunatic [or a person of unsound mind]." See Form 2.

47. *Forms of Advertisements in Lunacy.*

Elmer, pp. 186, 187.

48. *Application for Payment of Debts.*

Elmer, p. 187.

49. *Order referring it to Masters to inquire whether it is proper to pay the Lunatic's Debts.*

Re Hart, 22 March, 1842 ; cit. ap. Kay, 608.

50. *Order for Taxation of Solicitor's Costs, with a view to Payment.*

Re Hart, 22 March, 1842 ; cit. ap. Kay, 608.

CHAPTERS IX., X., XI.

51. *Summons for Appointment of Original Committee.*

See Form 45, supra, and R. L. 1890, Sch. Form 8, ante, p. 482.

52. *Evidence on Summons for Appointment of New Committee.*

See Elmer, p. 184.

53. *Order giving Liberty to a Third Party to apply for Committees.*

Re Webb, 22 July, 1846 ; 2 Coop. T. L. C. 155, 158.

54. *Consent and Undertaking of the Committees of the Person.*

In Lunacy.

In the matter of A. M., a person of unsound mind.

We, E. P. L., of, &c., and E. L. his wife, and J. M. T., of, &c., do hereby consent to be appointed and to act as the joint committees of the person of the above-named A. M., the sister of the said E. P. L. and J. M. T., and we hereby undertake to visit her once at least in every three months and at such other times as may be required, and to see that she is duly attended to and that she has all necessary comforts and enjoyments.

Dated this day of 18 .

E. P. L.
E. L.
J. M. T.

55. *Affidavit of Fitness of the proposed Committees of the Person.*

In Lunacy.

In the matter of A. M., a person of unsound mind.

I, J. C., of, &c., esquire, make oath and say as follows :—

1. That I have for ten years last past and upwards known and been intimately acquainted with E. P. L., of, &c., esquire, and E. L. his wife, and J. M. T., of, &c., who are, as I am informed and believe, the brothers and sister-in-law respectively of the above named A. M., and the persons proposed as committees of the person of the said A. M.

2. And I further say that they the said E. P. L. and J. M. T. are highly respectable, humane and trustworthy persons, and are respectively well qualified in every respect to be appointed the committees of the person of the said A. M.

Sworn, &c.

56. *Proceedings on Removal of the Lunatic out of the Jurisdiction under Special Circumstances.*

Elmer, pp. 165, 166.

57. *Consent and Undertaking Committee of the Estate.*

In Lunacy.

In the matter of A. M., a person of unsound mind.

I, H. W. T., of, &c., barrister-at-law, do hereby consent to be appointed and to act as the committee of the estate of the above-named A. M., and I am willing to give or provide such security as may be required for duly accounting for such estate.

Dated this day of , 18 .

H. W. T.

58. *Affidavit of Fitness of the proposed Committee of the Estate.*

In Lunacy.

In the matter of A. M., a person of unsound mind.

I, J. E., of, &c., barrister, make oath and say :—

1. That I have during the last ten years practised as a barrister, and during the last seven years I have known and been intimately acquainted with H. W. T., the proposed committee of the estate of the above-named A. M., and that the said H. W. T. is a highly respectable and responsible person and a man of business habits.

2. And I further say, to the best of my judgment and belief, the said H. W. T. is well qualified in every respect to be appointed the committee of the estate of the said A. M., and that he is of ability to give the requisite security for the due protection of the estate of the said A. M.

Sworn, &c.

59. *Form of Instructions to be left at the Masters' Office for the Preparation of the Grant to the Committee of the Person and Estate and the Security of the Committee of the Estate.*

In Lunacy.

In the matter of, &c.

The order for inquiry [*or* the commission, *where there has been a special commission*] describes the above-named A. B. as A. B., residing at, &c.

The inquiry was held at, &c., on the day of 18 .

The verdict was that the said A. B. was, &c.

The committee [*or* committees] of the person is [*or* are] C. D. of &c. [and E. F., of &c.].

The committee [*or* committees] of the estate is [*or* are] G. H., of &c. [and I. K., of &c.].

The proposed sureties are L. M., of &c., and N. O., of &c. (*a*).

The present residence of the lunatic is, &c.

The date of the fiat [*or* order] appointing the committees, and which is left herewith, is the day of 18 .

Dated the day of 18 .

(Signed) P. Q.,
Solicitor to the committees.

60. *Affidavit as to Death and Identity of late Committee.*

Elmer, p. 185.

61. *Affidavit as to Deposit of Securities in the Bank.*

Elmer, p. 200.

62. *Form of Order where Committee appointed, there being already a Receiver.*

C. P. Cooper, p. 253.

63. *Form of Committee's Bond.*

Elmer, pp. 168—169.

64. *Proceedings relative to the Preparation of the Bond.*

Elmer, pp. 170, 171

(*a*) The authority of the master must be obtained where it is desired to transfer stock into court, in lieu of giving security by bond.

65. *Proceedings to enforce the Bond.*

2 C. P. Cooper, T. L. C. pp. 73—79.

CHAPTER XIII.

66. *Evidence on application for appointment of a Receiver.*

See Elmer, p. 173.

67. *Form of Recognizance.*

Elmer, p. 174.

68. *Proceedings to enforce Recognizance.*

2 C P. Cooper, T. L. C., pp. 79 *et seq.*

CHAPTER XIV.

69. *Application for Discharge of Committee.*

See Elmer, p. 183.

70. *Order suspending Bankrupt Committee.*

Shelford, p. 233.

CHAPTER XV.

71 *For the evidence or Original Summons.*

See above, p. 494.

72. *Affidavit on Application for Change in the Scheme of Maintenance and for Payment of Debts and Liabilities.*

In Lunacy.

In the matter of J. T., a person of unsound mind.

The affidavit of W. P., of, &c., the committee of the person and estate of the lunatic,

States :—

That by the certificate made in the matter of this lunacy on the day of , 18 , the said W. P. was appointed the committee both of the person and estate of the said J. T.

That the particulars of the lunatic's estate are, &c. [*here state whether the particulars are the same as in the first report, and, if not, in what points they are different*].

That there is due from the lunatic's estate to the several persons named in the column of the schedule hereto the amounts set opposite their respective names in the said schedule, and that the creditors numbered in the said schedule are pressing for payment of their debts.

That the lunatic's residence at is out of repair and requires the expenditure upon it of a considerable sum of money.

That it would be for the lunatic's benefit and comfort that he should be placed in the house and under the charge of some experienced medical man to be approved by the court, and that his house and furniture at aforesaid should be sold.

That it has been ascertained on inquiry that any one of the undermentioned persons residing at the undermentioned places respectively is a fit and proper person with whom to place the lunatic, and is willing to take charge of him and provide for his comforts at the sum of £ per annum.

Dr. A., of .

Mr. B., of .

Messrs. C. & Son of .

The said W. P. therefore submits that it is fit and proper that so much of the lunatic's estate, comprised in part of the schedule to the said report, may be sold as will realize the aggregate amount due to the creditors whose claims are stated in the schedule hereto.

And that directions may be given for the sale of the said house and furniture at aforesaid.

And that the said lunatic may be placed under the care of at , who is a fit and proper person to receive him, and that there be paid to the said for the lunatic's maintenance, clothes, and medical care, the sum of £ , payable quarterly.

And the said W. P. craves leave, &c.

73. *Order for the Increase of the Allowance for Maintenance on the Marriage of one of the Daughters; and for a Payment of a Sum of Money to the Daughter to provide her Outfit.*

Re Drummond, 21 Nov. 1836; 1 M. & C. R. 630.

CHAPTER XVI.

74. *Affidavit as to granting a Lease.*

In Lunacy.

In the matter of H. W., a person of unsound mind.

The affidavit of T. F., the committee of the estate of the said H. W.,

Sheweth :—

That, by an inquisition, &c., the said H. W. was found, &c.

That in pursuance of an order made in this matter on, &c., the care and management of the estate of the said H. W. were duly granted to the said T. F.

That F. B., esq., one of the masters in lunacy, by his certificate bearing date, &c., found that the fortune of the said H. W. consisted of, amongst other particulars, an absolute interest for 1000 years from May, 1858, in a house and premises, No., &c., at the yearly rent of £ , and of the estimated annual value of £90, but then unoccupied.

That the said house and premises have still remained unoccupied, and C. B., who is, &c. [*state description and residence*], has offered to take a lease of the said house and premises for twenty-one years from the day of , 18 , at an annual rent of £105, and upon and subject to the terms and conditions mentioned and specified in a certain draft lease, marked with the letter A, which accompanies this state of facts, and at the foot of which the said C. B. hath expressed his approval thereof.

That the said rent is the best rent that can be reasonably obtained for the same house and premises, and that the terms and conditions of the said draft lease are fair and reasonable and beneficial to the estate of the said H. W.

That the said C. B. is able to pay the said rent, and to perform the covenants and agreements of the said draft lease, and that he is in all respects a desirable tenant for the said house and premises.

That it is considered to be for the benefit of the said H. W. and his estate, that a lease of the said house and premises should be granted to the said C. B. at the rent, for the period, and upon and subject to the terms, conditions, covenants and agreement specified and contained in the said draft lease.

The said T. F. therefore proposes that the said lease should be granted to the said C. B. in manner aforesaid.

75. *Lease of Lunatic's Estate.*

Bythewood's Jarman, by Sweet, vol. iv. p. 804. And see Elmer, pp. 191-195.

76. *Assignment of Lunatic's Leasehold.*

See Davidson's Conveyancing, for precedent.

77. *Evidence as to Repairs.*

Elmer, p. 138.

CHAPTER XVII.

78. *Form of Account.*

Elmer, pp. 177 *et seq.*

79. *Affidavit by the Committee of the Estate (being also the Committee of the Person) verifying his Accounts.*

In the matter of A. B., a person of unsound mind.

I, C. D., the committee of the estate and person of the said A. B., make oath and say that the foregoing account doth to the best of my knowledge and belief contain a just and true account of the several sums of money which have been received, retained and paid by me or by any other person or persons whomsoever by my order or for my use on account of the said A. B. or his estate, from the 25th day of February, 1874 [*or* from the time of my appointment as such committee] to the 25th day of February, 1875. And that the several sums of money in the said account mentioned to have been retained and paid were really retained and paid for the purposes therein mentioned, and that all the matters and things therein stated are true, and that there is no error or omission in the said account to the best of my knowledge and belief. And I further say, that E. F. and G. H., my sureties, are living, and that neither of them has been declared bankrupt.

Sworn, &c.

80. *Affidavit by the Executrix of a deceased Committee of the Estate (who had also been Committee of the Person), verifying the Testator's Accounts.*

In the matter of A. B., a person of unsound mind.

I, C. D., the executrix of E. F., deceased, the late committee of the person and estate of the said A. B., make oath and say, that the foregoing account doth to the best of my knowledge and belief contain a just and true account of the several sums of money which were received, retained and paid by the said E. F., deceased, or by any other person or persons whomsoever, by his order or for his use, on account of the said A. B. or his estate, from the 25th day of February, 1875, to the 10th day of September, 1875, the day of the death of the said E. F. And that the several sums of money in the said account mentioned to have been retained, paid or allowed by the said E. F., deceased, were, as I verily believe, really retained, paid and allowed by him, the said E. F., deceased, for the purposes in such account mentioned, and that all the matters and things therein stated are true, and that there is no error or omission in the said account to the best of my knowledge and belief.

Sworn, &c.

81. *Affidavit of Committee in lieu of formal Account.*

Elmer, p. 181.

CHAPTER XVIII.

82. *Application for a Supersedeas.*

See Elmer, pp. 228–229 ; R. L., 1890, 15.

83. *Affidavits in Support.*

Elmer, pp. 230 *et seq.*

84. *Order for a Supersedeas upon a successful Traverse.*

Re Leeming, 1 De G., M. & G. 275.

CHAPTER XIX.

85. *Affidavit identifying the Certificate of the Death of the Lunatic.*

In Lunacy.

In the matter of J. T., a person of unsound mind.

I, E. S., of, &c., doctor of medicine, make oath and say as follows :—

1. That for the last twenty years and upwards I have known and been professionally concerned as the medical attendant upon the said J. T., who resided many years prior to his decease at, &c., and departed this life on the 4th day of October, 1874, at, &c., aforesaid.

2. That the said J. T. is the same person as is mentioned in the annexed paper writing or certificate marked A., and is therein described as J. T., of, &c.

Sworn, &c.

86. *Request to deliver out Will on Lunatic's Death.*

Elmer, p. 247.

87. *Evidence on application to dispense with passing Committee's Account and for Delivery out of Deeds, &c., on Lunatic's Death.*

Elmer, p. 248 ; R. L., 1890, 100.

88. *Affidavit on application for the Transfer of Stock and Delivery out of Certificates of Foreign Security on the Death of the Lunatic.*

In the matter of J. T., late a person of unsound mind, but now deceased.

The affidavit of W. P., of, &c., formerly the committee of the person and estate of the said J. T., and now his sole executor,

1. By an inquisition taken at, &c., on the day of , 18 , the above-named J. T. was found to be a person of unsound mind, so that he was not sufficient for the government of himself and his estate.

2. The custody of the person and the care and management of the estate of the said J. T. were duly granted to me.

3. The said J. T. died on the day of 18 , having previously to his insanity duly made and published his last will, dated the day of 18 , whereby he appointed me sole executor thereof, and that will has since been proved by me in the principal registry of the probate division.

4. On the day of 18 , the sum of £ bank £3 per cent. annuities belonging to the said J. T. was, in pursuance of the certificate made in this matter on the day of and duly confirmed, transferred into the name of the paymaster-general in trust in this matter, and in pursuance of the same certificate the dividends which have since accrued thereon have been paid to me as such committee as aforesaid. The said sum of £ bank annuities is still standing in the name of the paymaster-general in trust in this matter.

5. On the day of 18 , as such committee as aforesaid, I deposited in the office of the masters in lunacy the following certificates belonging to the said J. T., namely [*here specify particulars*].

And all these certificates still remain so deposited and form part of the personal estate of the said J. T.

89. *Receipt and Affidavit verifying Signature to Receipt for Balance in passing a Final Account.*

Elmer, pp. 252, 253.

90. *Authority to receive Deeds and Affidavit verifying Signature thereto.*

Elmer, p. 224.

91. *Request for Production of Papers in Court.*

Elmer, p. 226.

BOOK I., PART II.

CHAPTER I.

92. *Application under s.* 116 *of Lunacy Act*, 1890.

See R. L., 1890, 12, 15, *ante*, p. 460, and also pp. 464, 465.

93. *Notice to alleged Lunatic of Application.*

R. L. 1890, 48, *ante*, pp. 464, 465.

94. *Notice of Objection by alleged Lunatic.*

R. L. 1890, 50, *ante*, p. 465.

95. *Affidavits in Support of Application.*

See the Forms Nos. 15—19, *supra*.

96. *Undertaking of Person Receiving Income.*

Elmer, pp. 438, 439.

CHAPTER II.

97. *Order by the Chancery Division for payment to a Husband of Dividends of Wife's separate Estate.*

See *Edwards* v. *Abrey*, 2 Coop. T. L. C., 190, 191.

98. *Order by the Chancery Division for payment out of a Fund in Court to the Keeper of a Private Lunatic Asylum the Amount due for Maintenance of the Lunatic.*

Peters v. *Grote*, 16 Jan. 1835 ; 2 Coop. T. L. C. 192, 193.

99. *Order by Chancery Division for Application of Dividends of a Fund in Court to past and future Maintenance of a Lunatic.*

Wilkinson v. *Letch*, *Eldridge* v. *Croucher*, *Machin* v. *Salkeld*, *Price* v. *Bedford*, *Bird* v. *Lefevre*, *Conduit* v. *Soane*, 2 Coop. T. L. C. 195, 207.

100. *Undertakings by Persons receiving Dividends on Behalf of a Lunatic not so found.*

Re Burke, 2 De G., F. & J. 124 ; *Edwards* v. *Abrey*, 2 Coop. T. L. C. 177 ; *Re Sturge's Trusts*, 5 Jur., N. S. 423.

101. *Order by Chancery Division for Payment to the Colonial Master in Lunacy of a Part of the Capital and the Dividends on the Remainder of a Fund in Court belonging to a Pauper Lunatic in the Asylum.*

Re Baker's Trusts, 15 Dec. 1871 ; L. R., 13 Eq. 172.

102. *Order for Purchase of Annuity on the Life of a Lunatic not so found out of a Fund in Court.*

Davies v. *Davies*, 29 March, 1852 ; 2 De G., M. & G. 54.

103. *Order by Chancery Division for the Appointment of a Guardian of a Lunatic not so found, with Inquiries into past and future Maintenance.*

Vane v. *Vane*, 2 Ch. D. 124.

104. *Application for Maintenance.*

Dan. Ch. Forms, No. 1407, and under Pauper Lunatic Acts, Nos. 1409.

105. *Affidavit in Support.*

Dan. Ch. Forms, No. 1408.

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CHAPTER IV.

106. *For Forms of Proceedings relating to Lunatic Trustees and Mortgagees.*

See Seton, pt. iii. c. xvii. ss. 10, 11.

CHAPTER V.

107. *Form of Order under the L. Act, executing a Power vested in a Lunatic.*

Re Bowmer, 3 De G. & J. 659.

CHAPTER VII.

108. *Summons and Affidavit in Support for Leave for the Committee to consent to an Application under the Leases and Sales of Settled Estates Act.*

Dan. Ch. Forms, No. 2230.

109. *Appointment of Surveyors to Assess Compensation where Owner a Lunatic; and their Valuation.*

Hodges' Railways, Appendix, "Forms," Nos. 31, 34.

CHAPTER IX.

For the forms applicable to the case of a plaintiff or defendant being a lunatic, whether so found or not, see Daniell's Chancery Forms, the index of which is marvellously minute.

CHAPTER XI.

110. *Application as to Custody of Lunatic's Will.*

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